Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

Petitioner,

v.

WILLIAM McEUIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Can Federal Rule of Evidence 403 be applied to exclude relevant and otherwise admissible state-of-mind evidence offered to prove the degree of reprehensibility of the defendant's conduct in a punitive damages case where equivalent evidence is not available to the jury?

Is due process violated if relevant and otherwise admissible state-of-mind evidence is excluded when that evidence would directly disprove any degree of reprehensibility of a defendant's conduct for punitive damages purposes?

Under the heightened standard of review required by this Court's holdings, should this Court exercise its supervisory power to clarify and ensure that appellate and trial courts provide an exacting review of a punitive damages award to ensure that it is not arbitrary?

Must trial and appellate courts apply heightened scrutiny in rigorously reviewing evidence offered in support of a punitive damages submission to ensure that, as required by *Gore* and *Campbell*, a defendant is not subject to an arbitrary punitive damages award?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

North West Handling Systems, Inc., a defendant-appellant below, is not a party to this proceeding.

Crown Equipment Corporation ("Crown") does not have a parent company and no public corporation owns 10% or more of its stock.

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Appendix B — Opinion and Order of the United States District Court for the District of Oregon Dated October 26, 2000 ..... 24a

OPINIONS AND ORDERS ENTERED IN THE CASE

McEuin v. Crown Equipment Corp., 328 F.3d 1028 (9th Cir. 2003), *as amended*, No. 00-36043, 2003 WL 21391671 (9th Cir. June 17, 2003). (App. A).

McEuin v. Crown Equipment Corp., No. Civ. 97-365-HA, 2000 WL 33950826 (D.Or. Oct. 26, 2000). (App. B).

STATEMENT OF JURISDICTION

Crown seeks review of the judgment entered by the United States Court of Appeals, Ninth Circuit, on June 17, 2003, after it denied Crown's petition for rehearing en banc. Crown sought and received a 30-day extension of time to file this petition. Justice O'Connor, on September 3, 2003, extended the time to and including October 15, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE INVOLVED

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

U.S. CONST. amend. V.

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

U.S. CONST. amend. XIV, § 1.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

STATEMENT OF THE CASE

Respondent William McEuin brought a products liability action against Crown and North West Handling Systems, Inc. in the United States District Court for the District of Oregon after he injured his left foot while operating a stand-up lift truck designed and manufactured by Crown and distributed by North West. The district court had diversity jurisdiction under 28 U.S.C. § 1332.

The case was tried to a jury. Central to the alleged product defect was Crown's decision to design the lift truck without a rear door.

Respondent's left foot was injured when the lift truck collided with a steel post after he extended his left leg outside the operator's cabin. Crown had provided the following warning, which the jury found to be adequate: "[h]ead, arms, hands or legs outside the operator area can be pinned or crushed whenever the truck is moving. Stay within the operator area and stop truck completely before getting off." But the jury found the lift truck design defective and awarded respondent $1,224,503.85 in compensatory and $1,250,000.00 in punitive damages. It divided the fault equally between respondent and Crown and North West. Accordingly, the court reduced the compensatory damages award to $612,251.92.[1]

Respondent based his punitive damages claim on arguments that Crown failed to show it had followed the necessary steps to produce a safe product, ignored accident data and chose not to install a rear door as a litigation strategy. Crown offered longstanding military specifications for stand-up lift trucks and independent engineering reports it had consulted when deciding whether to add a door to the lift truck. The military specifications offered by Crown show that from 1964 to the time the lift truck at issue was designed, the military required a design that "permit[s] unobstructed egress from the rear of the truck." The independent engineering reports solicited by Crown as part of its design process contain an analysis of test results and accident data. The reports conclude that Crown should not add a door to its lift trucks because it would increase the risk of serious injury and would not enhance safety. In response to respondent's objection to such evidence, Crown asked the court to instruct the jury that it could only consider the evidence for punitive damages purposes. The district court found the evidence was relevant, but excluded it as hearsay on the design defect issue and as more prejudicial than probative on punitive damages

1. Under the Oregon comparative fault scheme, if plaintiff was found one percent more at fault, there would have been no recovery of actual and punitive damages. O.R.S. § 18.470.

because the jury could not limit its use. The Court ruled it would be sufficient for Crown to tell the jury that it had relied on military specifications and engineering reports without revealing the specific subject matter or content of either.

Crown moved for judgment in its favor on punitive damages or a new trial. The district court denied its motions. The basis for Crown's motion for judgment as a matter of law was that the evidence was insufficient to support the verdict. One of Crown's bases for new trial was the improper exclusion of the content of the military specifications and engineering reports. Additionally, Crown asserted that the principles articulated in *Gore* invalidated the punitive damages award. The district court rejected these arguments and held that "it was not prejudicial error to exclude from the jury the content of the independent sources' work." Crown appealed the district court's rulings.

The United States Court of Appeals, Ninth Circuit, in a 2-1 decision, including a dissent, affirmed the district court's rulings. It held Crown was not prejudiced by the exclusion of the contents of the military specifications and independent engineering reports. The dissenting judge would have reversed the evidentiary ruling because it was prejudicial error to exclude the contents of the engineering reports.[2] The court of appeals also held respondent's evidence was sufficient to support reasonable inferences that Crown acted with the requisite state of mind to justify the punitive damages award.

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2. The dissent concluded that:

> Given the unquestioned significance of the reports, the district court's failure to admit them with a proper limiting instruction was an error. That error was prejudicial. . . . While the district court allowed Crown's engineer to testify that he relied upon the views of outside consultants, the impact of the reports was lost because the jury was not allowed to review them directly.

McEuin, App. at 22a.

REASONS FOR GRANTING THE PETITION

I. Introduction: Summary of Argument.

This case presents critical issues in punitive damages jurisprudence. While much of this Court's focus has been on grossly excessive punitive damages awards, there is an equally compelling if not greater need to address punitive damage awards that are the result of arbitrariness and capriciousness, as was the award here.

This Court has held not only that punitive damages awards must be subjected to exacting scrutiny to ensure compliance with due process requirements but just as importantly, if not more so, arbitrary punitive damages awards cannot survive such scrutiny. "While states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519-20 (2003).

This Court has also held that reprehensibility of a defendant's conduct is the most important factor in determining whether a punitive damages award can pass constitutional muster, and if so, in what amount. *Id.* at 1521. In this case, the trial court excluded the most relevant and probative evidence of the defendant's state of mind as it related to the design of the lift truck at issue and the court of appeals upheld this erroneous ruling. The trial court and the court of appeals also failed to apply exacting scrutiny to the evidence admitted on the issue of punitive damages. If either court had done so, it would have determined that the jury's decision was based on unsupported arguments of counsel and irrelevant and speculative hearsay that had no bearing on whether the design decision was made with wanton disregard for safety.

The court of appeals acted contrary to precedent and undermined fundamental notions of fairness and due process when it affirmed the district court's misuse of Rule 403 to exclude the most important and probative evidence offered on

the issue of punitive damages. The alleged product defect in this case upon which liability and punitive damages rest was Crown's decision to design its lift truck operated by respondent without a rear door. The jury found that this conduct needed to be punished and deterred and assessed punitive damages. In doing so, the jury had to find by "clear and convincing evidence" that Crown's "conduct was culpable by reason of motive, intent, or extraordinary disregard or indifference to known or highly probable risks to others."[3]

Crown offered relevant and highly probative state-of-mind evidence. This evidence included military specifications and independent engineering reports, each supporting its design decision. Crown had retained independent engineers to evaluate accident data and safety test results to determine the need for and safety effect of a rear door. No equivalent evidence was available to the jury in the case.

Crown offered the content of the military specifications and independent engineering studies because this evidence demonstrates why valid safety concerns caused Crown to design the lift truck without a rear door. Yet the district court ruled that ". . . those documents and reports would come in, albeit for the state-of-mind of Crown . . . And I guess it's a question under Rule 403, whether the relevancy of those documents outweighs its [sic] potential prejudicial value. And I think it's the opposite. . . ." (Tr. Trans. at p. 306, lns. 11-20). Both courts held

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3. The necessary elements under Oregon Law include "malice," or equivalent conduct. O.R.S. § 18.537. Oregon courts have defined "malice" as "a wrongful act done intentionally, without just cause or excuse." *Friendship Auto Sales, Inc. v. Bank of Willamette Valley*, 716 P.2d 715, 722 (1986). In a product liability action, there are additional criteria to guard against an unwarranted sanction. O.R.S. § 30.925 (punitive damages "shall be determined and awarded based upon the following criteria" including "the likelihood at the time that serious harm would arise from the defendant's misconduct"). The "misconduct required for an award of punitive damages means more than a finding that the product was defective, because a manufacturer may be liable 'even though [it] has exercised all possible care.'" O.R.S. § 30.920(2).

that the evidence was hearsay on the issue of product defect.[4] Further, both courts held that such evidence must be excluded, even for punitive damages purposes, because a limiting instruction would not prevent the jury from using it in the liability analysis. *McEuin*, App. at 18a, 28a. Crown maintains that courts cannot use Rule 403 to exclude relevant state-of-mind evidence and that if there is some potential for prejudice or confusion it must be admitted subject to a limiting instruction.

The decision to exclude Crown's highly relevant and probative exculpatory evidence should not have been upheld because it is contrary to precedent and violates fundamental due process. Rule 403 should never be used to exclude relevant state-of-mind evidence offered on the issue of punitive damages unless it is undeniably duplicative and thus a waste of time. It cannot be said that the excluded evidence would not have a substantial impact on a jury's decision to assess punitive damages.[5] As the jury did not have the evidence necessary to make an informed decision regarding punitive damages, the award was per se arbitrary.

State-of-mind evidence of a defendant in a punitive damages context is always relevant and highly probative. Use of Rule 403 to exclude relevant state-of-mind evidence in a punitive damages case is contrary to the principles articulated by this Court in *Pacific Mutual Life Ins. Co. v. Cleopatra Haslip*, 499

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4. For purposes of the punitive damage analysis, the evidence was not hearsay, because Crown offered it to show it sought and paid for the independent engineering analysis and that such independent review of accident data and independent testimony supported its design decision.

5. As the dissent concluded:

> Rather, the reports tend to show that Crown went to the expense and trouble to solicit an independent assessment with regard to the wisdom of adding doors to its forklift design. The fact that both of the independent consultants, after detailed analysis, recommended *against* the addition of doors is strong evidence that Crown did not act in bad faith.

McEuin, App. at 20a.

U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); and *Campbell.* Much like *Daubert*, this case presents a critical evidentiary issue of widespread importance and application. The standard articulated by the Court here will have a profound impact on punitive damages jurisprudence since the defendant's state of mind is always the critical issue.

Since punitive damages can arise in numerous types of cases, ranging from intentional torts and negligence to civil rights and statutory actions, a definitive standard set by this Court that directly addresses how, if ever, Rule 403 may apply to exclude relevant and probative state-of-mind evidence will be extraordinarily significant. Rule 403 and similar provisions of state evidentiary codes or state common law must not be used to exclude the most relevant and probative evidence in the reprehensibility analysis.

Moreover, if the court of appeals had conducted an exacting review of the punitive damages award in this case it would not have upheld the award. A close look at the evidence would have shown the court that the jury's decision was based on inferences from attorney arguments and speculative hearsay that had no bearing on whether the design decision was made with wanton disregard for safety.

This case, therefore, presents this Court with an opportunity to resolve an important question of law that will recur repeatedly in trial and appellate courts. The case shows it is necessary for this court to provide clarification of and set an exacting standard for the review of punitive damages evidence and awards from a submissibility standpoint. This standard, consistent with precedent, could be articulated as follows: Trial and appellate courts that review punitive damages awards must apply exacting scrutiny to all the facts and circumstances in the case to determine whether the punitive damages award is arbitrary such that it violates the fundamental notions of fairness embodied in the Due Process Clause of the United States Constitution.

If such a standard had been applied in this case, the trial court would not have instructed the jury on punitive damages and the court of appeals would not have upheld the punitive damages award.

II. The Ninth Circuit Court of Appeals' Ruling on Crown's State-Of-Mind Evidence Is Inconsistent with the Direction and Purpose of Federal Rule of Evidence 403 and the Decisions of This Court and the Circuit Courts of Appeals.

The Ninth Circuit has set a dangerous precedent by holding that Federal Rule of Evidence 403 may be applied to exclude the defendant's relevant and probative state-of-mind evidence in a punitive damages case. *See McEuin*, App. at 11a, 14a. The defendant's state of mind when the alleged tort occurs determines "the degree of reprehensibility of the defendant's conduct," which this Court has held to be "[t]he most important indicum of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575.

Federal Rule of Evidence 402 provides that "all relevant evidence is admissible except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Federal Rule of Evidence 403 states, "Although relevant, evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, however, is an extraordinary remedy that must be used with caution. *See United States v. Adkins*, 196 F.3d 1112, 1117 (10th Cir. 1999); *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979). It does not comport with this Court's teachings to misuse Rule 403 to exclude relevant state-of-mind evidence in a punitive damages case where such a ruling would violate fundamental notions of fairness and due process.

Courts cannot apply Rule 403 to exclude evidence just because it may have a tendency to suggest a decision on an

improper basis. *McRae*, 593 F.2d at 707. But the district court did so here and the court of appeals affirmed its error. Furthermore, courts "are especially wary of the exclusion of evidence probative of defendants' state-of-mind." *Advanced Medical, Inc. v. Arden Medical Systems, Inc.*, 955 F.2d 188, 202 (3d Cir. 1992). Courts should be loathe to exclude relevant state-of-mind evidence and must not do so where it is different in nature and degree than other available evidence.[6] Yet the court of appeals upheld the trial court's exclusion of Crown's relevant state-of-mind evidence. *McEuin*, App. at 11a, 14a.

Only if evidence has marginal relevance or may be offered just to create prejudice, must courts go one step further and determine whether the danger of unfair prejudice substantially outweighs the probative value of the proffered evidence. *Old Chief v. United States*, 519 U.S. 172, 180 (1997); *McRae*, 593 F.2d at 707. The courts in this case should not have done and did not need to do any balancing because Crown offered relevant and highly probative evidence to show it had a good-faith basis for its design decision. The courts in this case failed to perform this vital task. As explained in the Committee Notes to Rule 403, "'Unfair prejudice' within its context means an **undue tendency** to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Advisory Committee Notes on Federal Rule of Evidence* 403, 28 U.S.C.App. p.860 (emphasis added). Crown's proffered state-of-mind evidence was not hearsay as offered because it is the independent analytical data that told Crown it should not add a door to its lift truck. This evidence was admissible under any application of the Federal Rules of Evidence because it was offered as proof of Crown's decision-making process. There is no basis to hold it had an undue tendency to suggest a decision on an improper basis.

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6. It is not suggested that merely cumulative evidence must be admitted. Courts must determine whether state-of-mind evidence is merely cumulative or adds new and important facts for the jury to consider or whether the evidence is different in nature or degree.

A. The Independent Engineering Evaluations Show Crown's Design Process Focused on Safety and the Military Specifications Are Consistent with Them.

Crown engaged several independent engineers to evaluate Crown's accident data for lift trucks and analyze the effect of adding a rear door. These engineers, including UES and Romualdi, provided to Crown a thorough evaluation of accident circumstances, operator injuries, injury-avoidance, and the impact of proposed design changes. Crown utilized these reports during its design review.

None of the independent engineers recommended the addition of a rear door as a safety-enhancing modification. For example, the Romualdi engineers concluded that the "addition of a 'door' on the operator compartment would likely cause not only more injuries, but more severe injuries to operators of these lift trucks." Shealy's analysis also concluded that the addition of a rear door would increase the frequency and severity of accidents: "It is clear that anything that tends to impede the egress of an operator is likely to increase the likelihood of an injury and . . . increase the consequences of the accident or the severity of the injury as well. The addition of a latching door significantly increases the time . . . before exiting."

These independent engineering findings mandated Crown's conclusion that adding a door as standard equipment would jeopardize operator safety and create hazards. This was the most compelling independent evidence showing Crown's decision-making process with respect to the lift truck design. Moreover, the military specifications, which prohibit restrictions on egress from the operator platform, are consistent with the engineers' findings and Crown's decision.

B. The Independent Engineering Studies and Military Specifications Were Relevant and Admissible to Demonstrate That Crown Did Not Act with Wanton Disregard for the Health, Safety and Welfare of Others.

The court of appeals' decision to uphold the district court's exclusion of Crown's state-of-mind evidence is inconsistent with the law on punitive damages evidence. The current state of the law has been summarized as follows:

> . . . [E]vidence of any fact which legitimately tends to show the motive and intent of the defendant in doing the act complained of is admissible – as, for example, the existence or absence of malice or other aggravations essential to the allowance of such damages. . . . Since exemplary damages are given in most jurisdictions by way of punishment to an evil doer, all circumstances tending to prove that the defendant was without evil design, or though such design is admitted, to mitigate its existence, are admissible in evidence, either to show punitive damages should not be allowed, or if allowed, that they should be more restricted than if he had acted without provocation and in the absence of mitigating circumstances. Hence, for the purpose of showing that none but compensatory damages should be allowed, evidence is admissible to prove . . . that the defendant acted in good faith and with the honest belief that he was justified in doing it.

22 AM. JUR. 2D *Damages* § 925 (2003). These fundamental principles are drawn from federal and state cases that have addressed the admissibly of state-of-mind evidence offered on the issue of punitive damages. The Ninth Circuit's view not only ignores these precedents, it turns the analysis upside down. Its holding supports the proposition that even if evidence goes to the heart of the punitive damages analysis, Rule 403 may be applied to exclude it. *See McEuin*, App. at 11a, 14a. This decision undermines the foundation for and intended

function of Rule 403, which is "limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *McRae*, 593 F.2d at 707. Not even the most ardent advocate for respondent could suggest that the proffered state-of-mind evidence was of scant or cumulative probative force or offered for the sake of its prejudicial effect. Nothing could be further from the truth.

The instructions given to the jury in this case demonstrate that state-of-mind evidence was intended to and should have had a direct impact on the jury's decision.[7] As this Court found, "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the

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7. The court instructed the jury as follows:

> In order for the plaintiff to recover punitive damages against defendant Crown, the plaintiff must prove by clear and convincing evidence that Crown has shown **wanton disregard for the health, safety, and welfare of others**. . . .
>
> Wanton disregard for the health, safety, and welfare of others is conduct amounting to **a particularly aggravated deliberate disregard of the rights of others**. . . .
>
> In the exercise of the discretion, you shall consider evidence, if any, of the following: the likelihood at the time of the sale that serious harm would rise from defendants' misconduct, the degree of the defendants' awareness of that likelihood, the profitability of the defendants' misconduct, the duration of the misconduct, and any concealment of it, the attitude and conduct of the defendants upon the discovery of the misconduct, the financial condition of the defendants, and the total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the plaintiff, and the severity of criminal penalties to which the defendants have been or may be subjected.

(Tr. Trans. at p. 2155, ln. 20-p. 2156, ln. 24) (emphasis added).

imposition of further sanctions to achieve punishment or deterrence" *Campbell*, 123 S. Ct. at 1521. These principles, on their face, squarely and decidedly militate for the inclusion of all relevant state-of-mind evidence.

Courts must give careful consideration to whether relevant evidence should ever be excluded because Rule 403 is an extraordinary remedy, especially where punitive damages are at issue and the evidence goes to the core of that analysis. An exacting analysis is critical when the relevant evidence shows the defendant's state of mind and is offered to disprove or mitigate punitive damages. *See Campbell*, 123 S. Ct. at 1519-20. "In weighing the probative value of the evidence against the danger of unfair prejudice, the Courts must first examine the necessity for and probative effect of the evidence." *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 863 (5th Cir. 1983). There is no doubt that the state-of-mind evidence offered by Crown in the form of military specifications and independent engineering reports was relevant and highly probative. The analysis should have stopped there. Rule 403 should never be applied to exclude such evidence. The court should only determine whether the evidence is clearly cumulative and thus a waste of time. *See Vinieris v. Byzantine Maritime Corp.*, 731 F.2d 1061, 1064 (2d Cir. 1984). Crown's proffered evidence was unique in this case, so it was not cumulative and without question it would not have been a waste of time to admit it. A limiting instruction[8] could easily have been given to alleviate

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8. The rulings below also ignore the presumption that jurors are capable of and will follow instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Limiting instructions that the jury may only use evidence to decide a particular claim or element permit the admission of relevant evidence the jury needs to hear. Courts commonly use limiting instructions to cure potential misuse of evidence. *See United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1385-86 (4th Cir. 1995); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434-35 (10th Cir. 1993); *Forro Precision, Inc. v. International Business Machines Corp*, 673 F.2d 1045, 1057 (9th Cir. 1982).

concerns, if any, that the jury would use such evidence for an improper purpose. *See Mende*, 43 F.3d at 1302; *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 686-87 (11th Cir. 1984). *See also* Fed. R. Evid. 105.

Crown asked the district court to instruct the jury that it could use the military specifications and independent engineering reports only to decide Crown's state of mind for punitive damages purposes, but the court improperly refused to do so. (*See* Tr. Trans. at p. 306, Ins. 5-21). Given the presumption that a jury will follow such an instruction, it is clear that a jury would not consider this evidence for any "improper purpose" if instructed to apply it only to deciding punitive damages. This decision should have been corrected by the court of appeals because such relevant evidence should always be admitted and a limiting instruction is the appropriate vehicle for admission on a particular issue. *See Mende*, 43 F.3d at 1302; *Benedi*, 66 F.3d at 1385-861; *Faulkner*, 3 F.3d at 1434-35; *Forro*, 673 F.2d at 1057.

Instead, Crown was subjected to an arbitrary award of punitive damages based on a record devoid of the most relevant evidence, what Crown knew, and why it did what it did in making its design decisions. "A second factor to be taken into consideration in measuring the admissibility of potentially prejudicial evidence is whether the same facts could have been proved by other evidence." *Gross*, 695 F.2d at 863. No other evidence was available to show the jury that Crown had relied on engineering reports containing accident data and analysis of test results which showed that a rear door would actually make the lift truck less safe for operators. This evidence was not in any way similar to the federal regulations and industry standards admitted in the case.[9] Thus, the court of appeals should have

9. A reasonable jury could not have found it "highly probable" that Crown acted with malice, or with reckless and outrageous indifference. To the contrary, the uncontroverted evidence showed that Crown's design conformed to all industry and regulatory standards for safety, that Crown did *not* profit from its decision to design and

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reversed the district court's erroneous evidentiary ruling because the military specifications and engineering reports were highly probative and when punitive damages are involved, such state-of-mind evidence is admissible. *See Gross*, 695 F.2d at 863.

The court of appeals' decision also contradicts established law because an overly restrictive decision to exclude evidence under Rule 403 is improper when, as in this case, it arbitrarily precludes a party from the full opportunity to present its case to the jury. *Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 515 (6th Cir. 1996) (citing *West v. Philadelphia Electric Co.*, 45 F3d. 744, 748 (3d Cir.1995)). *See Vinieris*, 731 F.2d at 1064. Crown was prevented from effectively rebutting respondent's arguments that Crown failed to take appropriate steps to design a safe product, ignored accident data and chose a doorless design as a litigation strategy.

Whether Crown made a good-faith design decision based on safety concerns is the crucial punitive damages issue in this case and accordingly, the district court "should have followed a liberal policy in admitting [it] . . . No evidence which bore even remotely on this issue should have been kept from the jury unless it interjected tangential and confusing elements which clearly outweighed its relevancy." *Vinieris*, 731 F.2d at 1064. The court had no discretion under Rule 403, or otherwise, to exclude Crown's state-of-mind evidence.

The district court, however, offered little to no analysis of Crown's proffered evidence and totally failed to recognize its

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manufacture the forklift without a door, and that Crown made continuous efforts to examine and improve the overall safety of the forklift. Indeed, the B56.1 Subcommittee of the American Society of Mechanical Engineers ("ASME") twice considered and rejected the alternative design proposed by plaintiff's expert in this case. This evidence negates a finding of malice or equivalent conduct. Even so, this evidence is different in degree and nature from the independent engineering reports which focus not just on industry practices but specifically on Crown's own forklift design and whether a rear door should be added. In fact, such analysis by each independent consultant concluded that adding a rear door made Crown's forklift less safe.

significance in the punitive damages context. *See McEuin*, App. at 28a-29a. The improperly excluded evidence would have explained to the jury that Crown independently consulted safety experts who evaluated and analyzed accident data and testing when assessing the design of the lift truck. Such evidence also substantiated Crown's position that a doorless design was not a litigation strategy. All of this evidence directly proved Crown's state of mind and would have had a substantial impact on whether the jury decided to award punitive damages, and, if so, how much. Under the circumstances, no discretion was permissible and Rule 403 did not apply.

The court of appeals' analysis also failed to acknowledge that the district court's ruling actually created a greater risk of juror confusion. Rule 403's stated purpose is to eliminate potential juror confusion in the rare case that relevant evidence would confuse the jury. The district court ruled it would allow Crown to say it solicited and relied on engineering reports and consulted military specifications. (Tr. Trans. at p. 216 lns. 7-13). The court, however, would not allow Crown to show the jury that these reports and specifications recommended against a door because it would unduly restrict egress in an emergency and create a danger of serious injury or death. In doing so, the court put Crown at risk of confusing the jury by mentioning this evidence without revealing the substance of it.[10] The ruling left the jury to guess what the specifications and reports contained and to decide punitive damages based on respondent's otherwise baseless arguments about Crown's decision-making process.

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10. As Judge O'Scannlain in his dissent found: "While the district court allowed Crown's engineer to testify that he relied upon the views of outside consultants, the impact of the reports was lost because the jury was not allowed to review them directly." *McEuin*, App. at 25a-26a. Jurors certainly could have and in fact may have concluded that the substance of the reports must not have supported Crown's design decision, because otherwise Crown would have made sure that the substance and conclusions were in evidence.

Courts cannot exclude relevant evidence offered by defendants subject to a punitive damage claim that tends to prove the defendant lacked malice or any other culpable state of mind essential to whether punitive damages may be assessed by the jury. *See Campbell*, 123 S. Ct. at 1519-20; *Gore*, 517 U.S. at 575. The district court and the court of appeals discounted the critical fact that Crown's proffered evidence proved that Crown did not possess the requisite "wanton disregard" to subject it to punitive damages. Their rulings are contrary to precedent that recognize the importance of giving great weight to and admitting relevant state-of-mind evidence. *See, e.g.*, *Beckwith v. Bean*, 89 U.S. 266 (1878) (holding evidence inadmissible for justification was admissible to show lack of malice and every fact that showed defendants' motive was competent evidence); *Herbert v. Lando*, 441 U.S. 153, 161-62 (1979) (holding state-of-mind evidence is admissible with respect to punitive damages because plaintiffs must show malice, ill will, or indifference); *Advanced Medical, Inc. v. Arden Medical Systems, Inc.*, 955 F.2d 188, 202 (3d Cir. 1992) (stating courts "are especially weary of the exclusion of evidence probative of defendants' state-of-mind."); *Barnard v. Wabash Railway Co.*, 208 F.2d 489 (8th Cir. 1953) (holding evidence that tends to show a defendant's motive and purpose is admissible to mitigate punitive damages); *EEOC v. Indiana Bell Telephone Co.*, 256 F.3d 516, 528 (7th Cir. 2002) (holding trial court's exclusion of defendant's state-of-mind evidence disabled it from responding to plaintiffs' punitive damages evidence); *Global Petrotech, Inc. v. Engelhard Corp.*, 58 F.3d 198, 202 (5th Cir. 1995) (holding trial court's exclusion of evidence of defendant's mistaken belief had a substantial impact on the jury's determination of whether defendant acted knowingly, as required for punitive damages); *Palmetto State Medical Center, Inc. v. Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997) (holding trial court erred when it excluded defendant's evidence of its religious motives for anti-abortion activities as these motives related to punitives); *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 580 (3d Cir. 1983)

(holding court properly admitted evidence inconsistent with bad motive or reckless indifference required for punitives).

The decisions below are not only inconsistent with Rule 403 and its interpretive case law but also with the analysis and principles articulated by this Court in *Gore* and *Campbell*. Given this Court's holding in *Gore* that the reprehensibility of a defendant's conduct is the most important factor in evaluating the reasonableness of a punitive damages award, arbitrary use of Rule 403 to exclude relevant state-of-mind evidence cannot be justified. *See Gore*, 517 U.S. at 575.

III. The Exclusion of Relevant State-Of-Mind Evidence Violates Due Process When the Evidence Is Direct Proof That the Defendant Acted in Good Faith and Its Conduct Does Not Require Punishment or Deterrence.

A court violates due process if Rule 403 is used to exclude relevant state-of-mind evidence in a punitive damages case when there is no equivalent evidence in the case. Such a deprivation necessarily produces an arbitrary punitive damages award. This Court has thoroughly addressed the way in which punitive damages have been awarded and should be limited in light of due process concerns. *See Campbell*, 123 S. Ct. at 1520. The Court has not provided definitive guidance regarding the admissibility of relevant state-of-mind evidence offered by a defendant who is subject to punitive damages.[11] The Ninth Circuit's decision in this case, if left standing, would substantially weaken a defendant's ability to present its state-of-mind evidence relevant to whether punitive damages are

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11. This case presents important questions of federal law that has not been, but should be, settled by this Court. *See* Supreme Court Rule 10. This Court has thoroughly addressed the amount and scope of punitive damages awards in light of the due-process concerns of notice and excessive punishment. *See Campbell*, 123 S. Ct. at 1517; *Gore*, 517 U.S. at 562-63. It has not addressed the issue presented here: whether the exclusion of a defendant's relevant state-of-mind evidence violates due process when this evidence is direct proof of whether a defendant's conduct was reprehensible.

appropriate. Due process requires courts, at a minimum, to afford each party a full and fair opportunity to present their case to the jury.

Crown did not have a full and fair opportunity to present its case to the jury because the court excluded its most relevant and compelling evidence. The engineering reports and military specifications are substantial evidence that show respondent's punitive damages arguments were illusory. This evidence also would have shown that respondent did not have "clear and convincing" proof that Crown acted with "wanton disregard for the health, safety, and welfare of others" such that deterrence and punishment were necessary. (*See* Tr. Trans., at p. 2155, ln. 20 – p. 2156, ln. 24).

Crown raised due process and invoked *Gore* in its post-trial motions. The district court dismissed Crown's arguments and held *Gore* did not apply because the award was not excessive and Crown was not punished for out-of-state conduct. The principles articulated in *Gore* and reinforced in *Campbell*, however, address far more than excessiveness and out-of-state conduct. These cases set the exacting standard by which punitive damages awards must be judged in order to comport with basic notions of fairness and due process. As this Court reiterated in *Campbell*, "While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive **or arbitrary punishments** on a tortfeasor." *Campbell*, 123 S. Ct. at 1519-20. Due process requires that relevant and probative state-of-mind evidence must always be available to the trier of fact because this evidence envelops the most critical issue – whether the defendant's conduct was reprehensible and requires punishment and deterrence. The punitive damages award in this case does not pass constitutional muster because it constitutes an arbitrary punishment. The court permitted the jury to make an arbitrary decision when it excluded Crown's state-of-mind evidence.

The district court's and Ninth Circuit's restriction on Crown's right to present direct and relevant evidence in this case violates the Due Process Clause because it violates the fundamental principles of justice embodied in the procedural constitutional limitations that relate to punitive damages awards. *See Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (articulating principle that a restriction on the right to present relevant evidence violates due process if it offends some fundamental principle of justice). The primary guide to determining whether a principle is fundamental is historical practice. *Id.* at 43. There is a strong widespread and virtually unquestioned "historical practice" of admitting state-of-mind evidence as it relates to punitive damages in order to rebut evidence of culpable conduct. *See, e.g.*, *Beckwith*, 89 U.S. at 279-80; *Herbert v. Lando*, 441 U.S. at 161-62; *Advanced Medical*, 955 F.2d at 202; *Barnard*, 208 F.2d at 495-96; *Global Petrotech*, 58 F.3d at 202; *Indiana Bell*, 256 F.3d at 528; *Palmetto State Medical*, 117 F.3d at 149; *Stanton*, 718 F.2d at 580; *Vinieris*, 731 F.2d at 1063-64.

This Court's recent punitive damages decisions further demonstrate that the exclusion of Crown's state-of-mind evidence violates a fundamental principle of justice. It is fundamental that "[p]unitive damages . . . are aimed at deterrence and retribution." *Campbell*, 123 S. Ct. at 1519. As this Court held in *BMW v. Gore*, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. Neither Crown nor any other entity could expect or predict that it is subject to punishment if it makes a business decision, such as a design decision, based on valid safety concerns. The message sent by the Ninth Circuit's and district court's rulings in this case, however, is that even if a company conducts thorough research and evaluation before making a particular decision, it can be arbitrarily subjected to punitive damages for this conduct.

If the punitive damages award here passes constitutional muster, there is no product liability case in which punitive

damages will not be justified. Here punitive damages were unwarranted and resulted from an arbitrary exclusion of the most probative and relevant evidence. Crown faced a design decision whether to install doors on all of its standup forklifts. Based on its analysis of all available information, including the excluded evidence it decided not to install rear doors because it concluded it was the safest design alternative. Given the results at trial, logic and constitutional due process would dictate that if Crown had chosen to install doors on all of its standing lift trucks, Crown would be free from punitive damages claims. Not so. If this had been a tip over accident, and a claimant was rendered a quadriplegic because he could not exit the operating platform quickly enough to avoid or reduce his injuries, no doubt there would be a punitive damage claim based on Crown's decision to install a door. The very same excluded reports would have been offered to prove Crown's willful and wanton state of mind shown by its decision to ignore independent engineering reports that concluded the safer design was without a door. Due process does not exist when a defendant can be subjected to punitive damages no matter what decision is made. Arbitrary jury decisions based on such caprice cannot stand even slight scrutiny much less the rigorous scrutiny due process requires. This result contradicts the established purpose of and basis for a punitive damages award and cannot stand. Had the Ninth Circuit subjected the district court's decision to the "exacting scrutiny" required when reviewing a punitive damages award, this result could not have been affirmed. *See Campbell*, 123 S. Ct. at 1520-21.

Appellate courts are required to apply "exacting" scrutiny to punitive damages award to insure that it is based upon "an 'application of law, rather than a decisionmaker's caprice.'" *Campbell*, 123 S. Ct. at 1520-21. This Court

> [has] instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health

> or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an insolated incident; and the harm was the result of intentional malice, trickery, or deceit or mere accident.

Campbell, 123 S. Ct. at 1521. These factors demonstrate the importance of the state-of-mind evidence offered by Crown to rebut the plaintiff's argument that Crown ignored its own safety data when designing the subject lift truck. The fact that the Court excluded this relevant and probative evidence renders the punitive damages award in this case an arbitrary and capricious act.

If the district court and the court of appeals had considered the value and important functions of state-of-mind evidence, neither court could have excluded such evidence. The jury made an arbitrary decision to award punitive damages because the court would not permit it to learn that Crown had designed the lift truck without doors because the data it relied on warned that lift trucks with doors are more dangerous. This arbitrary award should not have been upheld and the process by which the award was arbitrarily allowed must be rejected and the result overturned by this Court.

IV. This Court Should Exercise Its Supervisory Power to Determine the Appropriate Standard for Admitting State-Of-Mind Evidence Relevant to Reprehensibility of a Defendant's Conduct in a Federal Trial That Involves a Punitive Damages Claim.

This case presents an issue of critical importance to every case in which the jury may assess punitive damages. The evidentiary rulings below demonstrate the need for a clear rule that favors admissibility of relevant state-of-mind evidence. This case presents an opportunity for this Court to determine the standard for admitting state-of-mind evidence relevant to the reprehensibility of the defendant's conduct in federal trials that involve punitive damages claims.[12]

12. This is an important question of federal law that has not been, but should be, settled by this Court. *See* Supreme Court Rule 10.

This Court has provided extensive guidance on assessing punitive damages awards in general. *See Campbell*, 123 S. Ct. at 1519-20; *Gore*, 517 U.S. at 568. But this Court has not yet determined the standard for admitting state-of-mind evidence in light of the principles articulated in its recent punitive damages decisions. As in *Daubert* and *Kumho Tire* this Court provided the standard for admitting expert scientific testimony in a federal trial and established a "gate keeping" obligation for courts, it is crucial that this Court define the obligation of courts with respect to state-of-mind evidence offered in a punitive damages case. The Ninth Circuit's decision in this case amplifies how important it is for this Court to provide this guidance.

It is clear that given the constitutional significance and danger of an arbitrary punitive damages award, courts have a crucial "gate keeping" function with respect to state-of-mind evidence. The Second Circuit Court of Appeals has stated the standard for admitting state-of-mind evidence in a punitive damages case: "No evidence which bore even remotely on state-of-mind should have been kept from the jury, unless it interjected tangential and confusing elements which clearly outweighed its relevancy."[13] *Vinieris*, 731 F.2d at 1064.

This is not an isolated issue. The admissibility of the defendant's state-of-mind evidence arises in any case with a punitive damages claim in contexts such as civil rights, intentional torts, statutory actions, products liability, and negligence. A plaintiff in any case can always argue that a defendant made a bad business decision, but this is not an appropriate basis for punitive damages. If the jury does not hear and see all available evidence of the substance of the decision-making process, a punitive damages award is arbitrary. This is why it is crucial for judges to ensure that the jury can perform a rational analysis of whether there is a need to punish and deter the conduct at issue.

13. The court set this standard in a case that involved payment of wages by a ship owner that included a claim for a punitive penalty under 46 U.S.C. § 596. Although the case involved a punitive statutory penalty rather than an award of punitive damages under a state statute, the standard is appropriate for courts to apply in punitive damages cases.

This case also raises critical issues because every company that makes safety-related decisions is subject to punitive damages. If Crown had added a door despite the engineering evaluations that told it a rear door makes a lift truck less safe and contributes to more serious injuries and fatalities, Crown would be subject to punitive damages for this conduct. *See* § III. Courts cannot constitutionally subject a defendant to punitive damages when the court knows there is relevant evidence available to show the defendant's conduct was not reprehensible. But in this case, the court wielded its power to disable Crown from defending itself against respondent's arguments that what was safety-driven conduct was reprehensible.

It is crucial for this Court to set the standard for admitting state-of-mind evidence in a federal trial that involves a punitive damages claim. The facts and circumstances of this case present the issue with clarity and demonstrate how egregious the result can be when a court fails to analyze punitive damages evidence with the required level of scrutiny.

V. The Courts Below Failed to Act in Accordance with the Principles Articulated in *Gore* And *Campbell* When They Failed to Apply "Exacting" Scrutiny to the Evidence Admitted to Determine Whether It Merited a Jury Instruction on Punitive Damages.

The evidence admitted in this case was insufficient to support an instruction on or an award of punitive damages.[14]

14. In this case, Crown's decision to design and manufacture its forklift without a door cannot be deemed wrongful, without just cause or excuse, or misconduct. It was uncontroverted that Crown's forklift conformed to the uniformly accepted design of all other forklift manufacturers in the industry, as well as the American National Standards Institute ("ANSI") requirements for forklift design and the standards promulgated by the Occupational Safety and Health Administration ("OSHA") for operator training. Compliance with industry custom and safety standards is crucial in analyzing Crown's mental state because it demonstrates that Crown met the applicable standard of care. *Hansen v. Abrasive Eng. & Mfg.*, 856 P.2d 625 (1993) (OSHA rules, like ANSI standards, provide "relevant information" as to "whether the defendant met the standard of care").

Both courts failed to apply "exacting" scrutiny to the punitive damages evidence and award. *See McEuin*, App. at 15a-18a; 25a-28a. Had the court of appeals applied the principles articulated by this Court in *Gore* and *Campbell*, it would have applied the necessary heightened scrutiny to the facts and circumstances and reversed the district court's decision to enter judgment for punitive damages. This case, therefore, also presents this Court with an opportunity to articulate the correct standard of review for punitive damages evidence.

The court of appeals said it applied a *de novo* standard of review to Crown's motion for judgment as a matter of law on respondent's punitive damages claim. *McEuin*, App. at 15a. This Court's punitive damages jurisprudence makes clear that heightened scrutiny is necessary to ensure fairness and constitutional due process that arise from punitive damages. The court of appeals' scant analysis of the law and facts provided an unwarranted focus on the factors that may militate in favor of a punitive damages award under Oregon law but ignored key factors that show respondent's evidence was insufficient to make a case for punitive damages. *See McEuin*, App. at 15a-18a. The principles articulated by this Court require courts to apply "exacting scrutiny" to punitive damages awards. *See Campbell*, 123 S. Ct. at 1520-21. That exacting scrutiny must apply to the submissibility of the punitive damage claim. Had the courts below taken a more "exacting" approach and fairly considered the substance of the facts and circumstances in light of the heightened standard that must apply to punitive damages awards, there would not be a punitive damages award in this case.[15]

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15. For example, in *Drabik v. Stanley-Bostich*, 997 F.2d 496 (8th Cir. 1993), the plaintiff claimed that the design of the "nailer" manufactured by Stanley-Bostich was unreasonably dangerous. The jury agreed and awarded punitive damages. The Eighth Circuit reversed the award of punitive damages because the manufacturer's design was the "standard in the industry" when the product was manufactured and "continues to be the standard today." The court held: "Compliance with

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The punitive damages award upheld in this case constitutes an arbitrary deprivation of property and thereby an arbitrary punishment. *Campbell*, 123 S. Ct. at 1519-20. Punitive damages present an "acute danger of arbitrary deprivation of property" and can only be awarded where clear and convincing evidence shows the defendant's conduct is so reprehensible it must be punished and deterred. *See Campbell*, 123 S. Ct. at 1520-21. The facts presented to the jury did not establish that Crown showed "wanton disregard for the health, safety, and welfare of others." (*See* Tr. Trans. at p. 2155, ln. 20 – p. 2156, ln. 24).

Careful consideration of the evidence presented and the conduct at issue shows this is not a punitive damages case. The conduct at issue was Crown's decision to design its lift trucks without a rear door. Crown presented evidence that it consulted government standards, ANSI guidelines and universal industry practices when designing the lift truck. *McEuin*, App. at 14a. Respondent extended his foot outside the operator area and injured it as a result. *McEuin*, App. at 3a. In doing so, respondent violated Crown's specific warning not to do so. Crown's warning not to extend limbs from the compartment was found to be adequate. *McEuin*, App. at 6a.

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industry standard and custom serves to negate conscious disregard and to that the defendant acted with a nonculpable state of mind with no knowledge of a dangerous design defect." *Drabik*, 997 F.2d at 510. The result was the same in *Wagner v. Clark Equipment Co.*, 700 A.2d 38 (1997), an action against a forklift manufacturer in which the Connecticut Supreme Court affirmed the withdrawal of the punitive damage claim from the jury:

> Although evidence was presented that Clark was aware of the general danger posed to pedestrians, the plaintiff failed to present sufficient evidence to demonstrate that Clark's failure to install a standardized system of safety devices rose to the level of reckless conduct, when such devices were not universally accepted by the industry and were not required under applicable safety standards at the time the forklift was distributed.

Wagner, 700 A.2d at 55.

Respondent made two arguments to prove Crown's design decision constituted reprehensible conduct:[16] (1) Crown misconstrued its own accident reports and data; and (2) Crown misrepresented ANSI guidelines to respondent's purported employer. *McEuin*, App. at 16a. Respondent also presented the speculative hearsay testimony of James Perry[17] that he "understood" Crown did not add a door to its lift trucks because it would affect litigation. (Tr. Trans. at p. 929, 2048, 2053, 2075, 2080, 2082). Mr. Perry could not even remember the name of the person who allegedly told him this. (Tr. Trans. at p. 929). This was the extent of respondent's evidence that Crown's design decision showed "wanton disregard for the health, safety, and welfare of others." (*See* Tr. Trans. at p. 2155, ln. 20 - p. 2156, ln. 24). Moreover, the jury found that plaintiff and respondent bore equal fault for the accident and injury at issue. *McEuin*, App. at 6a.

The courts below erred when they gave unjustified weight to respondent's mere unsupported arguments and irrelevant and speculative claim that Crown misconstrued its own accident data and that some unidentified person misrepresented ANSI guidelines to Perry. *See McEuin*, App. at 16a-18a. A closer look at this evidence reveals it is not state-of-mind evidence

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16. The record is devoid of evidence that Crown profited financially by designing its forklift without a door. Thus, Crown's conduct is not analogous to the defendants' conduct in *Lakin v. Senco Prods.*, 925 P.2d 107 (1996) (evidence supported finding that defendant rushed production in order to maintain its place in the market), or *Axen v. American Home Products Corp.*, 974 P.2d 224 (1999) (evidence supported finding that drug company's failure to warn of side effects was "driven by financial concerns related to its ability to market the product"). Plaintiff did not produce any evidence that installing a door as a standard feature would have negatively affected Crown's profits. To the contrary, the evidence showed that when Crown did install a door, the cost was passed on to the customer.

17. James Perry was the facility and equipment manager for Price Club stores on the east coast between 1991 and 1993. Later in 1993 after the purchase of the lift truck which was the subject of this lawsuit, Price Club and Costco for whom respondent actually worked merged.

that tends to prove Crown's design decision showed "wanton disregard for the health, safety, and welfare of others." *See Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (Asserting "[o]nly evidence which is relevant to the conduct for which liability is imposed can support an award for punitive damages."); (Tr. Trans. at p. 2155, ln. 20 – p. 2156, ln. 24). These arguments are irrelevant and speculative and of no substance. They inform the jury of nothing more than the fact that different people interpret data and standards in different ways. (*See, e.g.*, Tr. Trans. p. 1497-98, 1538, 1564-65 and Tr. Trans. p. 764). If, in fact, Crown had misconstrued its own accident data, which it vehemently denies, this conduct would constitute a mistake or negligent act, rather than wanton disregard.

Respondent's argument that Crown misrepresented ANSI guidelines is also irrelevant and unsupported speculation. Respondent built his case around the allegation that Crown had lied to James Perry about ANSI's standards. Although Perry had no connection to the purchase of the truck involved in this case, the Perry testimony became the focus of respondent's argument that the jury should award punitive damages against Crown. (*See* Tr. Trans. p. 2048, 2053, 2075, 2080, 2082). Such evidence cannot support a punitive damages award, especially where the conduct being punished is Crown's decision to design the lift truck without a rear door. *See Burke*, 6 F.3d at 511. These guidelines are not unique information that only Crown could access and interpret. In fact, Mr. Walker, who actually purchased the subject lift truck from Crown on behalf of Costco, respondent's employer, was well aware of the ANSI standards and completely agreed with them.[18]

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18. The uncontradicted evidence shows that Perry had no connection to the lift truck at issue and no connection to the decision not to install a door on it. McEuin worked for a different company, Costco. (Tr. Trans. 1101, 1103, 1109). The individual in charge of purchasing lift trucks for Costco during the period in question was not James Perry, but Tom Walker. (Tr. Trans. 1360). Walker testified that he had had no interest in adding doors to the stand-up lift trucks he purchased for Costco. (Tr. Trans. 1388-89, 1412). He saw doors as impeding

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The courts below also gave undue credence to Mr. Perry's speculative hearsay testimony that Crown designed its lift trucks without rear doors to avoid the potential use of this design change in litigation against it. *See McEuin*, App. at 16a-18a. The jury should not have been permitted to consider this otherwise inadmissible testimony to assess punitive damages.[19] The courts should have eliminated such unsupported and speculative testimony when evaluating the propriety of the punitive damages award.

If the court of appeals had conducted an exacting review of the punitive damages award in this case it would not have upheld the award.[20] A close look at the evidence would have shown the

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operators' ability to exit the machine and not necessary for safety (Tr. Trans. 1384-85, 1422-23). His beliefs about doors were not influenced by anything Crown told him. (Tr. Trans. 1409-10).

19. Because plaintiff had no evidence of a profit motive for Crown's design decisions, he seized on the notion of a "litigation strategy." Once again, he attempted to introduce this speculative theory of wrongdoing through Mr. Perry, but the record shows that there was no factual basis to support it. Mr. Perry said that he had a "feeling" about the litigation strategy after his 1991 meeting with Crown, even though he was not "involved in that end of things." He never identified any statement by a Crown representative as evidence of a "litigation strategy." Mr. Perry also testified that he "understood" Crown wanted to "avoid legal entanglements," but there was no evidence that his "understanding" was based on anything other than his pre-trial meetings with plaintiff's counsel. *See also* Plaintiff's Closing Argument ("They had a litigation strategy. That was the impression [Mr. Perry] had.")) Mr. Perry's testimony was neither clear nor convincing and a reasonable jury could not find that Crown had a "litigation strategy" based on it.

20. Judge O'Scannlain further stated in his dissent:

> That the failure to admit the reports was prejudicial to the defendant is apparent when one considers the plaintiff's closing argument, where counsel argued that Crown did not "objectively reach a decision as to whether doors are a good thing or not." The reports Crown commissioned provide a direct and highly relevant counter-point to this argument, but because of their exclusion, Crown was left with no comeback.

McEuin, App. at 22a.

court that the jury's decision was based on inferences from counsel's argument and speculative hearsay that had no bearing on whether the design decision was made with wanton disregard for safety.

Therefore, this case provides this Court with a compelling opportunity to resolve an important question of law that will recur consistently in federal trial and appellate courts. This Court should set an exacting standard for the review of punitive damages evidence and awards from a submissibility standpoint. This standard, consistent with precedent, could be articulated as follows: trial and appellate courts that review punitive damages awards must apply exacting scrutiny to all the facts and circumstances in the case to determine whether the punitive damages award is arbitrary such that it violates the fundamental notions of fairness embodied in the Due Process Clause of the United States Constitution. If such a standard had been applied in this case the district court would not have submitted a punitive damages instruction to the jury or would have entered judgment as a matter of law for Crown after the trial and if the trial court failed to act appropriately, the punitive damages award would not have been upheld on appeal.

CONCLUSION

This case presents an opportunity to address critical issues involving punitive damages jurisprudence. Lower courts need definitive guidance to ensure uniformity in approach to the use of Rule 403 to exclude state-of-mind evidence and on the standard for determining whether punitive damages should be submitted to the jury. The reasons for granting a writ of certiorari here are compelling and Crown petitions the Court to do so.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 24, 2003, AS AMENDED ON DENIAL OF REHEARING AND REHEARING EN BANC JUNE 17, 2003

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-36043

WILLIAM McEUIN,

Plaintiff-Appellee,

v.

CROWN EQUIPMENT CORPORATION,
fka CROWN CONTROLS CORPORATION;
NORTH WEST HANDLING SYSTEMS, INC.,

Defendants-Appellants.

Argued and Submitted March 7, 2002.
Filed April 24, 2003.
As Amended on Denial of Rehearing and Rehearing
En Banc June 17, 2003*

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* Judge B. Fletcher and Berzon have voted to deny the petition for panel rehearing but to make one minor change. Judge O'Scannlain has voted to grant the petition for panel rehearing. Judges O'Scannlain and Berzon vote to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

Appendix A

Before *B. FLETCHER*, *O'SCANNLAIN*, and *BERZON*, Circuit Judges.

Opinion by Judge *BETTY B. FLETCHER*; Partial Concurrence and Partial Dissent by Judge *O'SCANNLAIN*.

OPINION

BETTY B. FLETCHER, Circuit Judge.

Defendants-Appellants Crown Equipment Corporation and North West Handling Systems, Inc. (collectively "Crown") appeal the district court's ruling excluding the introduction of evidence in a product liability suit initiated by Plaintiff William McEuin ("McEuin"). McEuin was injured while operating a forklift manufactured by Crown. At trial, McEuin claimed that the forklift was defectively designed because the operator cabin was not enclosed with a door and because Crown did not provide an adequate warning concerning the risks associated with the forklift. The jury awarded McEuin compensatory and punitive damages. Crown contends that the district court erred in not permitting the introduction of military forklift design specifications and reports of independent engineers consulted by Crown. The district court had diversity jurisdiction to hear this action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

Appendix A

I.

Crown Equipment Corporation began designing stand-up forklifts in 1969. Crown eventually developed and produced for sale the 30RCTT-190 ("30RC"). The 30RC is operated from a standing position, with the operator facing sideways so that by turning his head 180 degrees he can shift his gaze from the front to the back end of the vehicle. Although Crown has manufactured and sold doors for the 30RC, the 30RC does not have a door enclosing the operator cabin as a standard feature.

In 1991, Price Co.[1] requested Crown to install doors on the stand-up forklifts it purchased from Crown to prevent or minimize injuries. Crown discouraged Price Co. from ordering the doors, and as a result, Price Co. did not order doors. In March 1993, North West Handling Systems, a distributor of Crown Equipment Corporation forklifts, ordered a 30RC from Crown Equipment Corporation, which it sold and delivered to Price Costco.

In 1995, McEuin injured his left foot while operating the 30RC in the course of his employment with Price-Costco. McEuin's injury occurred while he was operating the 30RC in a "forks-trailing," or reverse, direction. McEuin diverted his attention in order to check on the position of the cargo, extending his left leg outside the operator's cabin as he leaned toward the front of the forklift. His foot was crushed as the rear of the forklift collided with a steel post.

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1. Price Co. and Costco merged and became Price Costco in 1993. The merger was announced on June 17, 1993 and was completed on October 22, 1993.

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McEuin sued Crown in federal district court under Oregon tort law, Or. Rev. Stat. § 30.920, alleging that Crown is strictly liable for designing, manufacturing, distributing, and selling the 30RC in an unreasonably dangerous condition because (1) it failed to supply a door that would have reduced or eliminated the risk of injury to the operator's left leg, and (2) the 30RC was sold without adequate warnings of the severity of the risk of serious injury to the operator's left leg caused by the lack of a door. McEuin sought both compensatory and punitive damages.

The warning posted by Crown on the 30RC recommends that the operator "[s]tay within the operator area and stop truck completely before getting off" because "legs outside the operator area can be pinned or crushed whenever the truck is moving." McEuin testified that he never knowingly extended his foot outside the operator cabin, but that his action in extending his leg was involuntary. McEuin presented evidence at trial, through the testimony of his experts, that the inadvertent extension of his foot to maintain his balance and the resulting injury were foreseeable due to the openness of the 30RC design and the position of the operator within the cabin.

According to McEuin's theory of liability, the 30RC should have included a door in order to prevent accidents such as his from occurring. McEuin supported his claim for punitive damages by arguing that Crown ignored applicable safety standards, lied to James Perry, the Price Co. supervisor in charge of purchasing industrial equipment, and refused either to retrofit its 30RC forklifts with doors or to equip new models with them as part of a litigation strategy intended

to prevent potential plaintiffs from inferring that Crown conceded that the absence of a door was a design defect.

The district court excluded evidence considered by Crown to be crucial to its defense. In particular, the court precluded Crown from introducing evidence of military specifications requiring that forklifts be built without doors enclosing the operator cabin. Those specifications direct that, for forklifts purchased by the military, the operator's cabin "shall . . . permit unobstructed egress from the rear of the truck." Crown sought to introduce this evidence in order to show that the military specifications preceded and influenced the design of its forklifts.

In addition, the court precluded Crown from introducing reports generated by independent engineers and allegedly relied upon by Crown in the design of its forklifts. In 1989, Crown requested Universal Energy Systems to analyze accident reports involving forklifts operated, like the 30RC, from a standing position. Crown claims that the results of the analysis showed that prompt exit provided the best operator protection in off-dock excursions and tip-over accidents and that remaining within the operator cabin provided the best protection in collisions of the kind that caused McEuin's injury. In 1991, Crown hired Romualdi, Davidson and Associates ("Romualdi") to perform a similar analysis of accidents involving Crown forklifts producing similar results. Romualdi concluded that "the installation of a door or other type of closure to the operator compartment would not be advisable" because the addition of a door "would likely cause not only more injuries, but more severe injuries to operators of these lift trucks."

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Crown had intended to introduce both the military and independent engineering evidence in support of its position that forklifts with doors are more dangerous than forklifts without because of the resulting impairment of the operator's egress during potentially fatal accidents in which a forklift is tipped over. The district court did not allow the introduction of the reports or of the military specifications. The court did, however, allow Crown to introduce evidence that it had solicited and relied upon engineering reports and that it may have relied on military specifications in designing the 30RC.

At the close of McEuin's case and then again at the conclusion of the evidence, Crown moved for judgment as a matter of law on McEuin's punitive damages claim. The district court denied both motions.

The jury found that Crown's warning was adequate, but it found that the design of the 30RC was dangerously defective. It divided fault for McEuin's injury equally between plaintiff and defendants. The jury also determined that McEuin was entitled to punitive damages. The district court awarded McEuin half of his claimed compensatory damages ($612,251.92) and the jury's full recommendation of punitive damages ($1,250,000). Crown renewed its motion for judgment as a matter of law as to punitive damages under Fed. R. Civ. P. 50 ("Rule 50") and, alternatively, moved for a new trial under Fed. R. Civ. P. 59 ("Rule 59"). The district court denied Crown's motion, and Crown appeals.

II.

We review evidentiary rulings of the district court for abuse of discretion. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927-28 (9th Cir. 2000)). To reverse on the basis of an evidentiary ruling, this Court must conclude both that the district court abused its discretion and that the error was prejudicial. *Id.* "A reviewing court should find prejudice only if it concludes that, more probably than not, the lower court's error tainted the verdict." *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001).

The district court's denial of Crown's Rule 59 motion for a new trial is also reviewed for an abuse of discretion. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 818 (9th Cir. 2001); *E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 680 (9th Cir. 1997). The district court's denial of Crown's Rule 50 motion for judgment as a matter of law is reviewed *de novo*. *Monroe v. City of Phoenix*, 248 F.3d 851, 861 (9th Cir. 2001).

Appendix A

III.

A. Evidentiary Rulings

1. Military Specifications

The district court did not abuse its discretion in granting McEuin's pretrial motion to exclude the introduction of military specifications as irrelevant, thus inadmissable under Rule 402 of the Federal Rules of Evidence, to prove that the lack of a door on a forklift is not unreasonably dangerous. Crown sought to introduce the military specifications to demonstrate that the 30RC conformed with military standards, influenced the design of the 30RC, and supported its contention that a door is unreasonably dangerous. McEuin correctly argued that the military design specifications should be excluded because the 30RC "has no application in any military setting" and because "military standards have no relevance in a strict liability claim where the focus is on the question of whether the product was in unreasonably dangerous condition at the time of sale." *See* Or. Rev. Stat. § 30.920.

The district court also considered whether the military specifications should be admitted for the limited purpose of their relevance to the punitive damages claim. Although the military specifications may be relevant to prove the state of mind of Crown in designing the 30RC, the district court properly performed the 403 balancing test in determining not to admit the military specifications. *See* Fed. R. Evid. 403 (stating that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion, or undue delay). The court stated that excluding the military specifications "would not preclude the designer from testifying that he was aware of and may have relied on a military standard, without going into what the military standard is or was." Crown design engineer, Dan Dunlap, was permitted to and did in fact testify to this effect.

Crown argues that the specifications should have been admitted because McEuin took advantage of their exclusion to argue before the jury that no "standards" required Crown to manufacture its forklifts without doors. However, neither the American National Standards Institute ("ANSI") nor the Occupational Safety and Health Administration ("OSHA") require that forklifts be designed and manufactured without doors. *See Powered Industrial Truck Operator Training*, 63 Fed. Reg. 66,238 (codified at 29 C.F.R. §§ 1910, 1915, 1917, 1918, and 1926) (1998). ANSI, acting through subcommittee, promulgates standards for industrial vehicles operated in the private sector. The relevant ANSI standards provide:

> Operator protection [ ] shall be designed so as not to interfere with the normal operation of the controls, to allow getting on and off the truck easily, and to permit rapid exit in an emergency.

ANSI B56.1 Safety Standards § 7.28.3 (1990). Moreover, "[o]perator enclosures may be provided in conjunction with the platform. If provided, they shall permit easy ingress and egress from the platform." *Id.* § 7.34. Thus, ANSI regulations specifically note that doors may enclose the operator cabin. The military specifications at issue, not having the force of

law, could not have required Crown to manufacture its non-military 30RC forklifts to any particular specification.

Crown argues on appeal that the military specifications themselves are directly relevant to Crown's state of mind and, therefore, should have been admitted for the purpose of challenging McEuin's claim for punitive damages. Under Oregon law, a claim for punitive damages must be proved by clear and convincing evidence that the defendant "has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." Or. Rev. Stat. § 18.537(1). Punitive damages are interpreted by the Oregon Supreme Court as "a penalty for conduct that is culpable by reason of motive, intent or extraordinary disregard of or indifference to known or highly probable risks to others." *Andor v. United Air Lines, Inc.*, 303 Or. 505, 739 P.2d 18, 25 (1987); *see also DeMendoza v. Huffman*, 334 Or. 425, 51 P.3d 1232, 1242-43 (2002).

The court's qualification to its ruling, that defense witnesses would be permitted to testify to defendant's awareness of and reliance upon military specifications, speaks directly to the state of mind consideration. The court stated that it would permit Crown design engineers to testify as to their state of mind in considering military specifications while developing the 30RC without allowing them to introduce the contents of those specifications. Although the court did not explicitly refer to Fed. R. Evid. 403 ("Rule 403"), it seems likely that the court was concerned about the prejudicial effect of introducing the specifications themselves. Military

specifications would appear to carry the imprimatur of government sanction, and might therefore resemble in the jury's mind something akin to an actual regulation. In addition, both the legal effect and the genesis of these specifications might have been put at issue by introducing the specifications themselves, resulting in confusion of the issues for the jury as well as in an unnecessary waste of the court's time.

Because the court had discretion to exclude the specifications under Rule 403, it committed no error by doing so. *See, e.g., Longenecker v. Gen. Motors Corp.*, 594 F.2d 1283, 1286 (9th Cir. 1979) (stating that "[t]rial judges are better able to sense the dynamics of a trial than we can ever be, and broad discretion must be accorded them in balancing probative value against prejudice"). However, even if the court erred by excluding relevant evidence without relying upon Rule 403, Crown has failed to prove prejudice. Crown engineer Dunlap was permitted to provide state of mind testimony in which he referred to the military specifications. It is not clear that knowledge of their content would have influenced the jury's decision, as the specifications do not report the government's independent investigation into the safety considerations at issue in this case. In other words, the jury could have concluded that the military specifications were motivated by price rather than safety concerns. If the jury so concluded, the fact that Crown followed those specifications would do nothing to refute McEuin's theory that Crown was motivated by profit, rather than by safety concerns.

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2. Independent Engineering Reports

The district court did not err in granting McEuin's pretrial motion to exclude independent engineering reports as inadmissable hearsay. *See* Fed. R. Evid. 802, 901. Crown engineers allegedly solicited and relied upon reports by outside engineers. These engineers, however, were not provided as expert witnesses, and therefore, the reports could not be authenticated under Fed. R. Evid. 901. Crown suggested that the court receive the evidence with a limiting instruction to the jury, stating that the reports could not be used to resolve the issue of defect but could be used to determine Dunlap's state of mind when designing the 30RC. Although Crown indicated that it was inclined to agree with the court's analysis that the reports were inadmissible as to the strict liability claims, Crown continues to claim on appeal that the reports are admissible as to both the strict liability and punitive damages claim.

The district court decided to exclude the reports on two grounds. First, the court ruled that the reports were hearsay. Second, the court stated that "those documents and reports would come in, albeit for the state of mind of Crown; however, the actual impact, as viewed by the jury, would be such that I don't believe they could, in fact, limit the use of those reports for consideration with respect to possible punitive damages."

Federal Rule of Evidence 802 provides that hearsay evidence is not admissible. Hearsay is offered "to prove the truth of the matter asserted." Fed. R. Evid. 801(c); *see also Bergene v. Salt River Project Agric. Improvement & Power*

Dist., 272 F.3d 1136, 1142 (9th Cir. 2001). The district court's hearsay ruling properly applies to Crown's attempt to use independent reports as evidence that the design of the 30RC was not defective (i.e., against plaintiff's liability claim). However, the hearsay ruling does not apply to McEuin's punitive damages claim, because, as the court recognized, the reports would be relevant to reveal Crown's state of mind. Rule 803 provides for a state of mind exception to the hearsay rule, and Crown's attempted limited use of the independent engineering reports clearly satisfies that exception.

"A district court's decision to exclude or admit evidence under FRE 403 is reviewed with 'considerable deference.' " *United States v. Hankey*, 203 F.3d 1160, 1166 (9th Cir. 2000) (citing *United States v. Cordoba*, 194 F.3d 1053, 1063 (9th Cir. 1999)); *United States v. Easter*, 66 F.3d 1018, 1021 (9th Cir. 1995) (quoting *United States v. Fagan*, 996 F.2d 1009, 1015 (9th Cir. 1993), for the proposition that "[t]he district judge is given wide latitude in determining the admissibility of evidence under this standard."). Rule 403 provides that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. In order to exclude the independent reports from use to refute plaintiff's punitive damages claim, the court had to determine that their probative value was "substantially outweighed" by the danger of prejudice as provided by Rule 403. Crown requested the district court to admit the independent safety reports with a limiting instruction admonishing the jury to consider them only within the context of Crown's state of mind and not with regard to its liability inquiry. The court again offered a compromise similar to the one which it struck with regard to

the exclusion of the military specifications, stating that defense witnesses could testify that Crown retained independent consultants and relied upon their reports but could not testify as to the contents of those reports. We do not find that the court abused its discretion in excluding the engineer reports.

Even if the district court erred in excluding the independent engineer reports, Crown has failed to prove that it suffered prejudice. The jury received a substantial amount of evidence regarding the background information recommending a door that Crown relied upon when designing the forklift including ANSI standards, OSHA Regulations and Commentary, as well as testimony by Crown's designer Dunlap that he had consulted experts, received reports from them, and relied on their advice. The jury also heard testimony that an ANSI committee twice rejected a recommendation that doors become a requirement on stand-up forklifts. Although the excluded reports would have provided more evidence of the content of the materials Dunlap considered, the excluded evidence does not add anything to the background materials presented to the jury. Moreover, it is clear that the jury believed that Dunlap distorted data and other evidence for the purpose of limiting Crown's liability, including investigating tip-over and off-the-dock accidents while ignoring accidents such as McEuin's, although the latter were much more numerous. Expert reports commissioned by Crown and recommending against doors weighed against the distorted data likely would have done little to dissuade the jury from this belief. Therefore, we cannot conclude that excluding the engineer reports "more probably than not" tainted the jury's verdict. *Tennison*, 244 F.3d at 688.

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IV.

Following the jury's verdict, Crown moved under Rule 50 for judgment as a matter of law on McEuin's claim for punitive damages or, in the alternative, for a new trial under Rule 59. Crown provides no independent basis on appeal for remand for a new trial other than the evidentiary rulings discussed above. Since the district court did not abuse its discretion in applying the Rules of Evidence, there are no grounds for a new trial.

Crown's motion for judgment as a matter of law on McEuin's punitive damages claim is reviewed *de novo*. *Monroe*, 248 F.3d at 861. Punitive damages may be granted under Oregon law if the plaintiff demonstrates by clear and convincing evidence that the defendant engaged in "conduct that is culpable by reason of motive, intent or extraordinary disregard of or indifference to known or highly probable risks to others." *Andor*, 739 P.2d at 25. Factors available for the jury's consideration in determining liability for punitive damages include:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

> (e) The attitude and conduct of defendant upon discovery of the misconduct;
>
> (f) The financial condition of the defendant; and
>
> (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

Or. Rev. Stat. § 30.925(2). McEuin presented evidence satisfying several of these factors, including that Crown was aware of numerous collision-based accidents involving 30RC forklifts; that these accidents continued to occur over several years; that Crown attempted to conceal that the 30RC was defective by misleading Price-Costco as to the requirements of industry standards; and that Crown responded to knowledge of the collision-based accidents by maintaining its open-ended design in order to preclude an inference by potential litigants that Crown was correcting what it knew to be a defect in the 30RC's design.

"Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's." *Scott v. Ross*, 140 F.3d 1275, 1281 (9th Cir. 1998). A motion for judgment as a matter of law should be granted only if the verdict is "against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result," *Pape Lift*, 115 F.3d at

680 (internal quotation marks and citations omitted), and all evidence must be weighed in favor of the nonmoving party, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Conversely, Crown attempts on appeal to have us view the evidence selectively and in its favor.

First, Crown argues that its warning, advising operators of the potential danger in placing parts of the body outside of the operator cabin, is "not consistent with 'conscious disregard of or highly irresponsible indifference' to safety." While this particular piece of evidence does indicate a concern for safety rather than "conscious indifference," it does not in itself present overwhelming evidence contradicting the evidence provided by plaintiff. Oregon law makes no special exception relieving manufacturers from punitive damages if they issue product warnings.

Second, Crown refers us to evidence properly excluded by the district court at trial, such as the military specifications and independent engineering reports. The jury cannot be said to have reached an erroneous verdict because of evidence that was not before it at trial. Evidence not admitted at trial cannot be used in a review of the district court's denial of judgment as a matter of law. *Elbert v. Howmedica, Inc.*, 143 F.3d 1208, 1209 (9th Cir. 1998) (holding that when ruling on a Rule 50 motion, "[t]he record should be taken as it existed when the trial was closed").

As a result, Crown is left to support its motion only with testimony from defense witnesses to combat evidence of defendant's indifference to risk of harm to others. Testimony

by Crown engineer Dunlap, for example, contradicted plaintiff's contentions that Crown was indifferent to operator safety in collision-based accidents. However, there was other evidence from which the jury could draw reasonable inferences to the contrary. The district court may not reject the jury's verdict simply because another appears preferable. *Reeves*, 530 U.S. at 149-50, 120 S. Ct. 2097; *see also Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.").

V.

For the foregoing reasons, the district court did not abuse its discretion in excluding the military specifications and independent engineer reports on either the strict liability or punitive damages claims. Even if the district court erred in excluding the evidence, the error was harmless since it would not have affected the jury's verdict. Moreover, the district court did not err in denying Crown's motion for a new trial, or in the alternative, judgment as a matter of law.

AFFIRMED.

Appendix A

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

Because I readily agree with my colleagues that the military specifications were properly excluded, I join Parts I, II, and III.A.1 of the majority opinion. I believe the district court abused its discretion in refusing to admit the engineering reports, however, and therefore I must respectfully dissent from Part III.A.2.

To recover punitive damages, the plaintiff had to prove by clear and convincing evidence that the defendant acted with wanton disregard for the health, safety, and welfare of others. *See* O.R.S. § § 18.537, 30.925. The plaintiff built his case for punitives on evidence tending to show that the defendant had wilfully disregarded its own accident data, ignored applicable safety standards, and lied to purchasers of its equipment, all as a part of an overall strategy to stave off product liability litigation. In response to these charges of bad faith, the defendant offered evidence that it had commissioned two independent engineering reports. These reports recommended *against* the installation of doors because the addition of doors would cause more injuries, and more serious injuries. The district court excluded the reports, however, and the jury returned a punitive damages award of $1.25 million.

Federal Rule of Evidence 403 provides,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

> the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[1]

The significance of the independent reports is obvious. The plaintiff argued that Crown acted with reckless indifference in failing to include a forklift door, and that Crown ignored its own accident data, which allegedly showed a clear need for a door. Crown's retention of multiple, independent consultants directly counters this theory of the case, and strongly supports its contention that it did not close its eyes to the need for a door. Rather, the reports tend to show that Crown went to the expense and trouble to solicit an independent assessment with regard to the wisdom of adding doors to its forklift design. The fact that both of the independent consultants, after detailed analysis, recommended *against* the addition of doors is strong evidence that Crown did not act in bad faith.

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1. In excluding the independent reports, the district court misstated the standard for admissibility, stating that "it's a question, under Rule 403, whether the relevancy of those documents outweighs its potential prejudicial value." In doing so, the district court impermissibly placed the burden on Crown to show that the reports' probative value outweighed any potential for prejudice. While we have held that a district court abuses its discretion when it fails to apply the correct legal standard, *see Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223-24 (9th Cir. 2000), it may well be the case that the district court simply misspoke, and that it understood and applied the correct governing standard. It is not necessary to reverse on that ground because, even if the district court got the standard right, it gave insufficient weight to the high probative value of the reports, and its decision to exclude the reports tainted the jury's verdict.

The only factor the district court pointed to in excluding the reports was that they were hearsay as to liability,[2] and that therefore the jury may consider them for an improper purpose. To be sure, this is a legitimate concern, but it is one that could have been negated by the issuance of a limiting instruction. *See* Fed. R. Evid. 105 ("When evidence is admissible . . . for one purpose but not admissible . . . for another purpose . . . , the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Indeed, the defendant urged to the district court to admit the reports with a proper limiting instruction. Given the unquestioned significance of the reports, the district court's failure to admit them with a proper limiting instruction was an error.

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2. The majority suggests that because the reports are hearsay as to liability, they are only admissible because they come within Rule 803's 'state of mind' exception. With respect, this is wrong. Whether an item of evidence is hearsay depends on the purpose for which it is offered. *See* Fed. R. Evid. 801(c). The reports may be hearsay as to liability, but they are *not* hearsay as to the claim for punitive damages. This is so because the purpose of the offer is not to prove the truth of the matter asserted in the reports, but to show that Crown engaged in a good faith decision-making process. *See Keisling v. SER-Jobs for Progress, Inc.*, 19 F.3d 755, 762 (1st Cir. 1994) (affirming district court's decision to admit out-of-court statements because not being offered to prove truth of matter asserted, but to negate allegations of bad faith); *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 686 (11th Cir. 1984) (affirming district court's decision to admit reports in a products liability action because reports offered only for purpose of showing notice, and not to prove truth of matters asserted in the reports). Therefore, for the purpose of showing Crown's good faith, the reports do not come within the definition of hearsay, and the majority's reliance on Rule 803 is misplaced.

That error was prejudicial. *See Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (reversal required where evidentiary rulings result in prejudice). While the district court allowed Crown's engineer to testify that he relied upon the views of outside consultants, the impact of the reports was lost because the jury was not allowed to review them directly. The jury was unable to observe that the reports were comprehensive and obviously prepared by experts in the field. Nor was the jury able to view the substance of the reports, which directly supports Crown's contention that it, in good faith, believed the addition of a door would make its forklifts *more* dangerous.

That the failure to admit the reports was prejudicial to the defendant is apparent when one considers the plaintiff's closing argument, where counsel argued that Crown did not "objectively reach a decision as to whether doors are a good thing or not." The reports Crown commissioned provide a direct and highly relevant counter-point to this argument, but because of their exclusion, Crown was left with no comeback. The jury might well have come to a different conclusion on the issue of punitive damages had the district court admitted the reports with a proper limiting instruction, and in my view, "the lower court's error tainted the verdict." *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688 (9th Cir. 2001).

I am not unmindful of the fact that the district court, as it should, is afforded a great deal of discretion in making *Rule 403* determinations. But that discretion is not unfettered. *See, e.g., United States v. Crosby*, 75 F.3d 1343, 1349 (9th Cir. 1996) (district court abused discretion in refusing to admit evidence pursuant to Rule 403); *United States v.*

Blaylock, 20 F.3d 1458, 1464 (9th Cir. 1994) (same); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 642 (9th Cir. 1993) (same); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980) (same). Where, as here, the probative value of the excluded evidence is great, and the danger that the evidence will be considered for an improper purpose is slight, and easily mitigated by the issuance of a proper instruction, Rule 403 requires that the evidence should be admitted. *See* 2 James B. Weinstein et al., Weinstein's Federal Evidence § 403.02[2][c] (2d ed.2003) (discussing the preference under Rule 403 for admissibility).

In sum, I respectfully dissent from the decision to exclude the independent engineering reports. Because I would reverse for a new trial, I would not reach the issue as to whether the district court correctly denied the motion for a new trial on the issue of punitive damages.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED OCTOBER 26, 2000

UNITED STATES DISTRICT COURT
D. OREGON

No. Civ. 97-365-HA

WILLIAM McEUIN,

Plaintiff,

v.

CROWN EQUIPMENT CORPORATION,
FKA CROWN CONTROLS CORPORATION,
and NORTH WEST HANDLING SYSTEMS, INC.,

Defendants.

Oct. 26, 2000.

OPINION AND ORDER

HAGGERTY, J.

On May 12, 2000, judgment was entered in this action on behalf of plaintiff, who received a favorable jury verdict following trial on April 10, 2000. Defendants subsequently filed a motion for judgment as a matter of law, or in the alternative a new trial (doc. # 173). Defendants have also moved for relief from judgment (doc. # 180). For the following reasons, these motions are denied.

Appendix B

1. Defendants' motion for judgment or new trial

Defendants seek judgment as a matter of law regarding the issue of the award of $1,250,000 in punitive damages, arguing that the evidence presented at trial was insufficient to support such an award. Judgment as a matter of law is appropriate when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is contrary to the jury's verdict. *Omega Environmental, Inc., v. Gilbarco, Inc.*, 127 F.3d 1157, 1161 (9th Cir. 1997), citing *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993).

Defendants argue that a reasonable jury could not have concluded that it was "highly probable" that Crown acted with malice or reckless and outrageous indifference. After construing the evidence in the light most favorable to plaintiff, however, it cannot be said that only one reasonable conclusion, one which is contrary to the jury's, is permitted. The evidence presented at trial, if viewed most favorably for plaintiff, suggested the following: Crown's forklifts were unreasonably dangerous; the explanations proffered by Crown for failing to put doors on the forklifts were specious; Crown's collection of information was skewed and/or misleading; Crown committed misrepresentations; and Crown stood to possibly profit from disregarding important safety concerns involving the addition of forklift doors. This evidence, when accepted and viewed from a perspective favoring plaintiff, was sufficient to support the jury's decision to award punitive damages. Defendants' contentions offer rational interpretations of other evidence, which suggest that it would have also been reasonable for the jury to deny an

award of punitive damages to plaintiff. While this is true, the possibility of reasonable alternatives to a jury's verdict is insufficient to compel judgment as a matter of law.

Defendants also contend that the punitive damages award should be construed as unconstitutional under *BMW of North America v. Gore*, 517 U.S. 559 (1996). That decision provides an analysis for determining whether a civil award can be deemed excessive. In part, the decision also instructs that a state court may not consider lawful conduct occurring outside of that state that had no impact on the state or its residents when determining punitive damages. *Id.* at 1597.

In concluding that the award of punitive damages was "grossly excessive" and therefore unconstitutional in the case before it, the Supreme Court identified various components to that conclusion, including: the notice the party being punished received regarding the possible severity of the punishment; the degree of reprehensibility in that party's conduct; the disparity of harm suffered by the injured party and the punished party; and the differences between the punitive damages and the civil penalties authorized in comparable cases. *Id.* at 1598-99.

This court concludes that defendants had adequate notice of the potential punitive damages assessable in a personal injury lawsuit of the nature plaintiff presented. Moreover, the degree of reprehensibility has already been addressed above—when viewed in a light favorable to plaintiff, the evidence supports the jury's decision about punitive damages. The disparity that existed between the award and the injury suffered in *BMW* is lacking in this case, as well.

In sum, defendants' reliance upon the decision in *BMW* is unavailing. The jury's award was not so excessive as to be unconstitutional, and lawful conduct by defendants that had no impact upon Oregon's residents was not used to inflate the punitive damages.

Defendants also seek judgment as a matter of law on grounds that plaintiff's theory that Crown's forklift was unreasonably dangerous because its design lacked a safety door should never have been submitted to the jury. Defendants contend that this claim is inconsistent with the federal regulatory scheme for forklifts, *see Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), and because plaintiff failed to present sufficient evidence in support of the theory. Plaintiff's "proposed alternative design," which—despite defendants' skewed construction—amounts to the addition of a safety door coupled with warnings and instructions, is not contrary to ANSI or OSHA standards to any extent that would prompt this court to declare that plaintiff's theory must be pre-empted.

Similarly, defendants' challenge of plaintiff's expert testimony regarding this theory is without merit. During trial defendants failed to object to plaintiff's experts on grounds that they did not follow reliable, scientific methodology. Defendants also failed to seek a Rule 104 hearing, and omitted these assertions in their pre-verdict motion for judgment as a matter of law. Moreover, defendants' arguments call for the court to weigh evidence and to assess the testimony presented—in short, defendants' untimely objections are directed at the proper weight the jury should have attributed to the expert evidence, and fail to establish

that such evidence was insufficient. Plaintiff's evidence concerning design defects was adequate to present the issue to the jury.

In the alternative to obtaining judgment as a matter of law, defendants seek a new trial under Federal Rules of Civil Procedure 59(a), due to three alleged errors committed by the court. First, defendants assert that the court erred in excluding the admission of evidence concerning consultants' reports and military specifications. The court permitted defendants to present testimony that Crown's forklift was designed after consideration of test results from independent design consultants. The substance of those test results, however, was excluded. Similarly, defendants were allowed to testify that Crown relied upon military standards in designing its door-free forklift, but the military standards themselves were excluded.

Defendants contend that the exclusion of this evidence was error requiring a new trial, because the evidence was directly relevant to Crown's "state of mind" (at issue because of the claim for punitive damages), and was not offered to prove the truth of the matter asserted. This argument is rejected. The court permitted defendants to present relevant and sufficient "state of mind" evidence by introducing evidence of the independent sources relied upon for Crown's design decisions. It was not prejudicial error to exclude from the jury the content of the independent sources' work. The reasonableness of Crown's decisions and actions were at issue in the trial, not the relative wisdom or rationale contained in what the consultants concluded or what the military did. Toward that end, the jury was permitted to consider the

sources relied upon by Crown, why Crown retained those sources and relied upon them, and the extent to which Crown acted in accordance with those sources' actions or decisions. Electing to preclude consideration of the merits or flaws of those other sources' actions or decisions fails to amount to prejudicial error necessitating a new trial.

Next, defendants complain that the court erroneously permitted plaintiff to add a claim for punitive damages without first conducting a hearing to examine the grounds for such damages under ORS 18.535. This court has previously concluded that the procedure identified in ORS 18.535 is not a mandatory requirement in federal court. *See Pruett v. Erickson Air-Crane Co.*, 183 F.R.D. 248 (D. Or. 1998). Moreover, defendants' claims of being "ambushed" by testimony supporting an award of punitive damages are specious. The claim for punitive damages was added in early 1998, and this action went to trial in March, 2000. Defendants elected not to challenge the claim by motion for summary judgment, and received plaintiff's witness list (containing summaries of anticipated testimony) before trial.

Finally, defendants assert that the court erred prejudicially when it excluded the designated portions of the deposition of Victor Gonzalez, a forklift operator who jumped out of a forklift during an off-dock accident. At the pretrial conference, the court advised defendants that they would be permitted to present the videotaped deposition in response to the testimony defendants anticipated from plaintiff's expert witnesses Sevart and Harris. This ruling was confirmed at trial after these experts testified, and was issued formally in

a Minute Order on March 29, 2000, which stated that defendants were allowed to present the unedited portions of the Gonzalez deposition "in light of Dr. Harris' testimony." *See* Doc. # 156-1. Defendants presented what they term "a short portion" of the videotape to the jury, and now seek a new trial because the entire deposition was not introduced. There was no offer of proof made regarding other portions of the videotape, and the court recalls no further argument or request regarding the introduction of other portions. The ruling at the pretrial conference was made in the context that defendants' counsel offered the designations to rebut the testimony expected (and ultimately received) from plaintiff's experts. The court advised defendants at the pretrial conference that they would be allowed to "show the videotape as to Mr. Gonzalez's injury" for impeachment purposes. No prejudicial error is present in the court's subsequent confirmation of this ruling, and in allowing defendants to, as the court order reads, "show the unedited portions of the video tape deposition of Victor Gonzalez."

2. Defendants' motion for relief from judgment

Defendants have also moved for relief from the judgment entered against them, and seek a new trial to permit a jury to assess newly discovered evidence, pursuant to Fed. R. Civ. P. 60(b)(2) and 60(b)(3). Rules 60(b)(2) and (3) gives the court power to vacate judgments on grounds of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);" or "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

Appendix B

Rule 60(b)(2) provides that a court may grant a party relief from a judgment based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). The test for newly discovered evidence requires that the moving party show that the evidence: (1) existed at the time of trial, (2) could not have been discovered through due diligence, and (3) was "of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987).

Rule 60(b)(3) permits a losing party to move for relief from judgment on the basis of "fraud, . . . misrepresentation, or other misconduct of an adverse party." To prevail, the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, and that the conduct complained of prevented the losing party from fully and fairly presenting the defense. *See Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986); *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-79 (9th Cir. 1990). Rule 60(b)(3) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987).

The genesis of defendants' motion for a new trial is an alleged misrepresentation by plaintiff's counsel at trial and in closing arguments regarding Crown's influence upon two employees of Price Club who were contemplating the purchase of forklifts from Crown in 1991. Plaintiff presented

evidence through the testimony of one of the employees, Jim Perry, who had, with the second employee Derek Tatum, visited Crown's Ohio plant in May, 1991. Perry testified that during the meeting, Crown representatives said Crown would not put doors on Price Club's forklifts because doors would create a greater "category of risks," and that doors were prohibited by the American National Standards Institute ("ANSI"). Perry testified that this statement caused him to change his mind about preferring doors for Price Club forklifts, and that he had subsequently "come to realize that I was lied to." Perry Tr. at 31-32.

In his closing statements, counsel for plaintiff argued to the jury that both "Jim Perry and Derek Tatum wanted doors" on the forklifts for Price Club, and that "they had been persuaded not to pursue doors anymore because of what Crown told them." Defendants did not object to these closing arguments, but now assert that they went beyond the scope of the evidence presented at trial and amount to misconduct on the part of plaintiff's counsel.

Defendants also move for a new trial on the basis of newly discovered evidence, in the form of a declaration from Tatum, prepared and acquired after the trial, in which Tatum asserts that "Sometime during 1991 the question of putting doors on our stand ups came up. . . . My own conclusion was that a door would not improve the design of the truck." Tatum Declaration, Para. 2. In the declaration, Tatum also stated that his "best recollection" from the Crown meeting in Ohio in May, 1991, was that Crown represented that a door "was against their design and that they would not put one on a stand up rider." Tatum said he did not recall "anyone from

Crown saying that a door violated ANSI standards or that ANSI prohibited doors," and that he was confident that he would have remembered statements to that effect. *Id.* at Para. 3. Tatum also explained that he was contacted by plaintiff's counsel before the trial, and that Tatum had told the attorney that Tatum was "completely against adding doors to the Crown lift trucks." *Id.* at Para. 5.

Defendants construe this as "newly discovered evidence," and contend that it contradicts both Perry's testimony, and a key basis for plaintiff's claim for punitive damages. Defendants also assert that the declaration reveals that plaintiff's counsel knowingly made false statements to the jury during his closing argument. Defendants seek a new trial on these grounds.

Defendants' post-judgment acquisition of a declaration from a potential witness, the identity of whom was known to both parties before trial, fails to compel the court to grant a new trial because of "newly discovered evidence." The Rule requires the "newly discovered evidence" to be evidence "which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Defendants present no persuasive argument that they were unable, with due diligence, to learn of Tatum's recollections of the May, 1991, meeting with Crown in time to move for a new trial under Rule 59(b). In his amended complaint, plaintiff alleged that Crown made false statements at the May 1991 meeting, and reiterated these claims in the pretrial order. Plaintiff's Exhibit 132, which was provided to defendants in the exchange of exhibits leading to trial, is a letter that Crown addressed to both Perry and Tatum

following the May, 1991 meeting. In short, defendants knew before the trial that both Perry and Tatum attended the May, 1991 meeting on behalf of Price Club, and defendants knew before trial that plaintiff alleged that Crown made false statements to these men at the meeting.

Moreover, the evidence is not "of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer Co.*, 833 F.2d at 211. A fair reading of Tatum's declaration establishes that he fails to recall whether the statements Perry testified to having heard were made at the May, 1991, but that Tatum believes he would have remembered them if they were. Tatum also came to the conclusion in 1991 that adding doors to a stand up forklift was not an improvement, and he indicated this position to plaintiff's counsel before trial. While such testimony, if defendants had chosen to obtain and present it, would have provided the jury with some grounds for discrediting Perry's differing recollections, it cannot be said that the jury's awareness of Tatum's failure to share Perry's recollections would have likely changed the trial's disposition.

Defendants' assertion that a new trial is necessary because plaintiff's attorney suggested in closing arguments that Tatum's views coincided with the witness Perry's is similarly without merit. As reviewed above, Rule 60(b)(3) permits a losing party to obtain a new trial upon proof by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct, and a showing that the conduct complained of prevented the losing party from fully and fairly presenting that party's case

or defense. *See Wharf v. Burlington Northern Railroad Co.*, 60 F.3d 631, 637 (9th Cir. 1995).

The declaration presented by defendants reveals that Tatum explained to plaintiff's counsel before trial that Tatum "was completely against adding doors to the Crown lift trucks." The evidence presented at trial suggested that both Perry and Tatum were "against adding doors" following their meeting with Crown in May, 1991, but that prior to the meeting, Perry and Tatum had preferred Crown forklifts to be "retrofitted" with rear doors to keep the operators' feet "inside the lifts during panic stops." Plaintiff's Ex. 131 (May 2, 1991 Price Club Memorandum).

Plaintiff's counsel's reference in closing statements that both "Jim Perry and Derek Tatum wanted doors" on the forklifts for Price Club, and that "they had been persuaded not to pursue doors anymore because of what Crown told them" was arguably objectionable for going beyond the scope of the actual evidence presented to the jury (although defendants made no such objections).

Tatum's subsequent statement that he explained to plaintiff's counsel that he now opposes adding doors to forklifts, however, falls far short of clear and convincing evidence that the verdict was obtained through fraud or misconduct. As Tatum further explains in a supplemental declaration, his statement to counsel expresses Tatum's current "state of mind" about the issue of adding doors to forklifts. Tatum also explains that while he formed his opinion opposing doors on forklifts "sometime in 1991," he cannot recall whether he reached that conclusion before or

after the meeting with Crown in May, 1991. *See* Supplemental Declaration of Derek Tatum, attached to Plaintiff's Response to Defendants' Motion for Relief from Judgment.

Accordingly, while plaintiff's counsel may have erred in attributing the testimony of one witness to represent the beliefs of both that witness and the beliefs of a co-worker, there was evidence before the jury that both Price Club employees initially preferred forklifts with doors, and changed their minds after meeting with Crown in May, 1991. Defendants did not object to these arguments by plaintiff's counsel when they were made. Defendants' subsequent submission of a declaration from Tatum that indicates only that he told plaintiff's counsel before trial that he opposes the addition of doors to forklifts fails to provide clear and convincing evidence of fraud or misconduct warranting a new trial.

CONCLUSION

For the reasons provided above, defendants' motions for judgment as a matter of law, or in the alternative a new trial (doc. # 173), and motion for relief from judgment (doc. # 180) are DENIED.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
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No. 03-585

In The Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

Petitioner,

v.

WILLIAM McEUIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether this Court should address constitutional arguments raised by a party for the first time in its petition for certiorari.

2. Whether a trial court should have discretion under Fed. R. Evid. 403 to limit the manner of presenting certain evidence, some of which involves expert opinions, so as to reduce the likelihood that the evidence will be improperly used by the jury for an impermissible purpose.

3. Whether the standard by which courts assess the sufficiency of evidence to submit the question of punitive damages liability to the jury should be made more strict than the well-established standard that applies to other questions involving the sufficiency of a party's evidence.

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BRIEF FOR RESPONDENT IN OPPOSITION

In this product liability action, defendant Crown approaches this Court with arguments it never made before the courts below: arguments for a categorical limitation on trial court discretion over admission of evidence, and for a more stringent scrutiny of a motion for judgment as a matter of law than is afforded by the prevailing *de novo* appellate review. Its petition should be rejected.

STATEMENT OF THE CASE*

In a customary forklift maneuver, plaintiff drove a Crown forklift across a warehouse in a forks-trailing *(i.e.,* reverse) direction, with a load of bakery racks on the forks. Plaintiff thought he heard the load shift, leaned forward and to the right to check the load's stability, and in an involuntary response to maintain his balance,[1] extended his left leg outside the unguarded opening in the rear of the operator compartment. At that moment, the forklift collided with a steel post, crushing plaintiff's left foot.

Plaintiff contended that Crown's forklift was defective and unreasonably dangerous because of a design that

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* Record references are to the Excerpt of Record (ER) or Supplemental Excerpt of Record (SER) filed by the parties in the Ninth Circuit.

[1] Dr. Gerald Harris, a biomechanical engineer (*see* SER 11-22 and 653 for a summary of his qualifications), testified: "That's – an involuntary movement. That's a normal postural stability movement. That's the kind of movement that you'd produce to maintain your posture." SER 46-7. Another expert agreed: you cannot train someone not to do an involuntary act. SER 219.

failed to provide the operator with the proper protection, or, alternatively, because of an inadequate warning.[2] A forklift colliding with a wall or post at 1/2 mph will crush or amputate a foot trapped between the surfaces. SER 118, 536. The solution was the simple expedient of a door which would enclose the operator compartment. SER 148. Crown acknowledged that it had built hundreds of forklifts with doors, none of which had caused serious injury to an operator; that a door on a forklift is economical, safe, and complies with all OSHA and ANSI standards; and that Crown's competitors offer doors as a special order item or optional equipment. SER 147, 149, 154-55, 157-58, 194, 321-22, 326. Crown conceded that more than 310 operators had their left foot crushed in an accident similar to plaintiff's, on forklifts that lacked doors. SER 564, 569-601. These injuries constituted more than 85% of the major injuries reported from collisions, tipovers, and off-dock accidents involving Crown forklifts. *Id.* Plaintiff presented extensive evidence that doors are effective in reducing injuries.

All experts for both parties agreed: with a door on the Crown forklift, William McEuin would not have been injured.[3] The parties disagreed as to whether a door would

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[2] The jury determined that the warning was adequate, but that the forklift was defective and unreasonably dangerous in its design. ER 597-99.

[3] SER 517 (defendant's expert Johnson); SER 327-8 (Crown's product safety engineer Dunlap); SER 518-19 (defendant's expert Kazarian); SER 156 (plaintiff's expert Sevart); SER 54 (plaintiff's expert Harris); SER 309 (plaintiff's expert Fries). On the record of this case, this may be the only good example of truly uncontradicted testimony.

be an overall benefit or would, on the other hand, increase the severity of injuries from tipovers or off-dock incidents; they disagreed about the proper interpretation of Crown's accident data; they disagreed about what role the operators themselves played in these accidents; they disagreed, in other words, as to virtually every other aspect of plaintiff's claims. On all these contested issues, both parties presented evidence. ANSI standards, said Crown, did not require doors; plaintiff's riposte was that neither did the ANSI standards forbid them. ER 367; SER 325. Crown agreed that the forklifts it supplied *with* doors did meet ANSI standards. SER 313, 325. OSHA standards did not prohibit doors on forklifts, nor did it require them. SER 194, 217.

Plaintiff's evidence in support of his claim for punitive damages begins with lies. Perry, the facilities and equipment manager for one arm (Price) of what eventually became plaintiff's employer (Price/Costco), wanted doors on forklifts; Crown told him that ANSI standards prohibited doors (they didn't), and had caused the death of two forklift operators (they hadn't). In correspondence during the following year, Crown continued to misrepresent to Price that doors had killed operators, and in fact took the unsupported (and unsupportable) position that a foot crush injury suffered by a Price employee would have been much worse or even fatal if the forklift had a door.

Perry also testified that Crown representatives told him that the addition of doors "might make it appear as if previously-manufactured lifts had been deficient, that they were unsafe, and, therefore, they had to put a door on them." SER 237. This, Crown said, might expose them to litigation problems by suggesting that the previously manufactured forklifts were unsafe. SER 232-33, 235, 237.

At trial, Crown proffered testimony which the jury could find false. Crown testified that accidents occurred in circumstances clearly refuted by Crown's accident reports, and to injuries that didn't exist. SER 71; 345-46; 437-41; 458-92; 504-6. Crown's employees testified that they were instructed to tell plaintiff's employer that two operators had been crushed to death by doors; Crown denied issuing any such instruction. SER 496-501. Crown had repeatedly made similar misrepresentations and inconsistent statements, in this and other litigation;[4] Crown had made these same misrepresentations to other customers than Price/Costco. SER 321-22, 395, 415-17.

Crown's product safety engineer testified that no number of leg crush injuries would persuade him that Crown should offer doors for its standup riders. SER 514-15. Given the evidence, a jury could find this position a classic exercise in either blindness or obstinacy. A jury could also find that defendant's attitude was an example of "conscious indifference" of a known risk. ORS 18.537(1).[5]

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[4] For instance, in February 1998 Crown reported there had been 3 serious injuries to operators who stayed with the forklift during a tipover; in February 1999 Crown reported six. In March 1999 Crown again reported 3; at the trial of this case Crown first claimed 6 and then 4. SER 344, 357, 358-59, 437. In fact, Crown's accident history reflected, at most, one serious injury to an operator who stayed with the forklift during a tipover, and because of inconsistent reporting a jury could have concluded that not even this one existed. SER 71, 352-55, 565, 585, 588.

[5] ORS § 18.537(1) permits an award of punitive damages when "it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of

(Continued on following page)

This is the evidence which Crown repeatedly characterizes, before this Court, as "unsupported arguments of counsel and irrelevant and speculative hearsay." Petition at 4, 26-30.

The jury returned a verdict for plaintiff for $1,224,503.85 in compensatory damages (subsequently reduced by 50% for plaintiff's contributory fault) and $1,250,000 in punitive damages.

On appeal, Crown presented two issues: (1) whether it was an abuse of discretion to limit the form in which evidence relevant to state of mind was presented (referring to the court's ruling limiting evidence of the military specifications which Crown stated it had considered in its original design process in the late 1960s, and limiting the form in which Crown could present evidence that it had relied on the opinions of consultants in determining not to add a door to the forklift); and (2) whether the district court had erred when it denied Crown's motion for judgment as a matter of law on punitive liability.

In its appeal to the Ninth Circuit, Crown did not suggest that these issues had constitutional import. More specifically, Crown did not argue that the Fourteenth Amendment or this court's precedents mandated a closer scrutiny of the rulings to which it assigned error than was provided by the customary standard of review.

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harm and has acted with a conscious indifference to the health, safety and welfare of others."

REASONS FOR DENYING THE PETITION

I. Introduction and Summary

Crown presents no issue of any substance, much less a constitutionally significant one that was properly preserved. In fact, Crown seeks review of fact-specific rulings by the Ninth Circuit and the trial court. Its request should be denied.

In an effort to attract this Court's attention, the defendant attempts for the first time in this appeal to parlay a trial court's discretionary evidentiary ruling, and a fact-sensitive ruling on a routine motion for judgment as a matter of law, into a proposition that such decisions in punitive damages cases have constitutional import, and require a "heightened scrutiny."

Crown urges the adoption of an interpretation of Fed. R. Evid. 403 that would severely limit a trial court's ability to exclude evidence that has any relevance to a defendant's state of mind. Crown articulates a concept of a judge as "gatekeeper" which, instead of relying on a judge's discretion to foreclose testimony where appropriate (*Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)), completely removes that discretion for a particular kind of evidence offered by a particular party – exculpatory evidence presented by a defendant in a punitive damages case – even when it is presented in the form of an expert opinion.

As to the sufficiency of the evidence to create a jury question on punitive damage liability, Crown does little more than reiterate its desire for an "exacting scrutiny" or "heightened review" (phrases it repeats seventeen times in its 30-page brief). What it does not, and cannot, do is tell

this Court what precedents would support or policies would be advanced by this adjustment to the familiar appellate process and the accepted standard for reviewing these questions.

II. Crown did not present to the courts below the issues it raises in this Court.

Crown barely raised constitutional questions after trial. In the midst of its argument that there was insufficient evidence to justify submitting the question of punitive liability to the jury, Crown inserted a single summary reference to *BMW of North America, Inc., v. Gore*, 517 U.S. 559 (1996) contending without elaboration that the award was excessive and "should be substantially reduced" *See* ER 624-25. Crown's primary focus was its assertion that the evidence did not meet Oregon's statutory standards for an award of punitive damages, and Crown suggested that the *BMW* factors should be considered "in determining whether there was sufficient evidence to support an award of punitive damages in any amount" (ER 625) – *i.e.*, apparently as a gloss on the usual standard for a judgment as a matter of law. No such contention was repeated in the Ninth Circuit.[6]

[6] In Crown's briefs to the Ninth Circuit, there was no mention of the Fourteenth Amendment, and no citation of this Court's opinions analyzing due process limitations on the amount of a punitive damages award. *BMW, supra; Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 403 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Even in its motion for rehearing, Crown never contended that the Fourteenth Amendment demanded a different standard of review, particular to punitive damages case, of evidentiary issues or motions for judgment as a matter of law; or that Fed. R. Evid. 403 should be applied differently when the defendant in a punitive damages case proffers exculpatory evidence. The only time such an argument surfaced in the Court of Appeals was when *amici curiae,* appearing for the first time in support of Crown's petition for a rehearing or rehearing *en banc,* argued that due process concerns mandated admissibility.[7] In the Ninth Circuit, Crown accepted that its evidentiary assignment should be reviewed "for abuse of discretion,"[8] a standard of review repeatedly reiterated by this Court. *See* discussion in the next section of this brief. Yet Crown now argues that the constitution requires a categorical rule which would eliminate trial court discretion and prohibit an evaluation of potential prejudice whenever a defendant offers what it claims is exculpatory evidence in defense of punitive liability.

Not until its petition for certiorari did Crown – or even the *amicus curiae* who appeared belatedly in the Court of Appeals – argue that a trial court's denial of a defendant's challenge to the sufficiency of evidence in support of punitive liability had constitutional implications, or required a more "exacting" appellate review than

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[7] Brief of Amici Curiae American Insurance Association *et al.* Not even in this brief was it argued that due process requires a categorical rule of admissibility, or an interpretation which eliminates trial court discretion.

[8] Brief of Defendants-Appellants at 28.

the familiar *de novo* review of motions for judgment as a matter of law.

Crown's failure to address these issues below forecloses the arguments it makes to this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

III. The district court reached an appropriate accommodation between Crown's interests and the prejudice to plaintiff of allowing expert opinions to be presented without an opportunity to examine the witness.

Contrary to Crown's assertions, the district court did not prevent Crown from presenting evidence that it had relied on military specifications when it originally designed the forklift, or that it relied on reports by consultants when it decided to prescribe guidelines for the use of this information. The court did not "wield its power to disable Crown from defending itself." Petition at 24.

Crown complained on appeal that it should have been allowed to introduce copies of the military specifications for forklift purchases by the Department of Defense, dating from 1964 to 1996. Exhibits 1049 through 1052, ER 291 through 319. The primary argument in support of admission of these specifications was Crown's contention that they had played a part in the original design of the forklift in the late 1960s. SER 526. The trial court allowed Crown's designer to testify that the forklift was designed to comply with the military specifications. ER 210. Crown offered no explanation why Defense Department specifications would have anything to do with a forklift purchased and used by a private corporation in its non-military business, nor did it explain why the later specifications

were relevant at all. Even the dissenter in the Court of Appeals "readily agreed" that these specifications were properly excluded (Petition at 19a) and Crown makes no more convincing argument here than it did in the trial court for their relevance.

That leaves the question of Crown's attempt to introduce the written reports of experts whom it had consulted but whom it did not call to testify. To this day, Crown asserts that there was no basis under any circumstances for excluding these reports, even if they had been offered on the issue of product defect, where they were clearly hearsay. The Court of Appeals noted the same refusal to acknowledge the factors which weighed against admissibility. Petition at 12a.

The district court *allowed* Crown to present the following evidence:

1. That Crown relied on the military specifications when it initially designed the forklift. ER 210.

2. That Crown consulted experts, their identity and their qualifications. *See, e.g.,* ER 218-19.

3. What the experts were asked to do (*i.e.,* analyze Crown's accident data). *Id.*

4. That the consultants made recommendations regarding the addition of doors to the forklift. *Id.*

5. That Crown relied on and followed these recommendations when making its decision not to incorporate a door. *Id.*

All this evidence went to the jury. And Crown availed itself of other routes to present similar evidence:

1. Crown could, and did, present evidence as to why it thought doors were dangerous. This was the focal point of Crown's defense. ER 207-209.

2. Crown could, and did, relate the results of any of its investigations into accidents. ER 233-36.

3. Crown could, and did, describe the testing in which Crown participated and report the results. ER 223-25; SER 315-20.

Finally, of course, if Crown wished to present in greater detail and explore the substance of its consultants' opinions, it could have avoided the entire hearsay problem by designating the consultants as expert witnesses, asking them to testify, and permitting plaintiff to cross-examine them.

Fed. R. Evid. 403 provides that evidence, even where relevant,

> may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This Court has long held that a ruling which strikes a balance between these countervailing poles is within the discretion of the trial court and is reviewed for abuse of discretion. *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879). More recently, in *U.S. v. Abel,* 469 U.S. 45, 54-55 (1984), this Court held that

> a district court is accorded a wide discretion in determining the admissibility of evidence under

> the Federal Rules. Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403[.]

Thus this Court affirmed the district court's decision limiting or "redacting" the form of evidence to avoid undue prejudice, and rejected a challenge to its admission: "These precautions did not prevent all prejudice to respondent * * * , but they did, in our opinion, ensure that the admission of this highly probative evidence did not unduly prejudice respondent." *Id.; see also Old Chief v. U.S.*, 519 U.S. 172, 192 n. 10 (1997) (holding that where the defendant offered to stipulate to a prior conviction, evidence of it should have been ruled inadmissible even where it was an element of the crime charged; but suggesting that a redacted record of a prior conviction could be an appropriate compromise under such circumstances). In *General Electric Co. v. Joiner*, 522 U.S. 136, 141-42 (1997) this Court reiterated those propositions:

> We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. [Cites to *U.S. v. Abel, supra,* and *Old Chief, supra*, omitted.] Indeed, our cases on the subject go back as far as *Spring Co. v. Edgar,* 99 U.S. 645, 658, 25 L. Ed. 487 (1879) where we said that "cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous."

In *Old Chief, supra*, 519 U.S. at 184, this Court emphasized that probative value must be assessed by comparing the proffered evidence with other evidentiary alternatives than the one proffered:

> The Notes to Rule 403 then take up the point by stating that when a court considers "whether to exclude on grounds of unfair prejudice," the "availability of other means of proof may . . . be an appropriate factor." Advisory Committee's Notes on Fed. Rule Evid. 403. The point gets a reprise in the Notes to Rule 404(b), dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character: "**No mechanical solution is offered.** The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under 403." Advisory Committee's Notes on Fed. Rule Evid. 404. (Emphasis added).

But Crown urges exactly what *Old Chief*, and the rule-makers, rejected – the kind of "mechanical" application which eliminates any role for discretion:

> Crown maintains that courts cannot use Rule 403 to exclude relevant state-of-mind evidence.

Petition at 6.

> There is no doubt that the state-of-mind evidence offered by Crown * * * was relevant and highly probative. The analysis should have stopped there. Rule 403 should never be applied to exclude such evidence.

Petition at 13.

Indeed, *Old Chief* spoke directly to Crown's proposition that state-of-mind evidence can only be rejected if it is "cumulative:"

> That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

519 U.S. at 183-84.

In the same term as the opinion in *Old Chief*, the Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993), establishing a standard of evidentiary reliability as a precondition to the admissibility of expert opinion. The Court advised trial courts to utilize a "flexible inquiry" under the evidentiary rules to screen such opinions, emphasizing "vigorous cross-examination" as a "traditional and appropriate means of attacking shaky but admissible" expert opinions. 509 U.S. at 596. And although the "primary locus" of a trial court's "gatekeeping" obligation is Rule 702, this Court noted also the role of Rule 403:

> Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . " Judge Weinstein has explained: "Expert evidence can be both powerful and quite

> misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Weinstein,* 138 F.R.D. at 632.

509 U.S. at 595.

See also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (the trial court must have considerable leeway in deciding whether the proffered opinion is reliable and the same degree of latitude in deciding how to test its reliability). Thus, even if it were true, as Crown asserts, that courts should be especially wary of the exclusion of state-of-mind evidence, it is also true that courts have been advised to be wary of the effect of expert opinion on the jury, and the role of trial court discretion in handling expert opinions has been repeatedly emphasized.

Indeed, Crown's urgent request for a categorical, non-discretionary rule that mandates admission is particularly ironic – and inappropriate – in light of this Court's subsequent opinion in *General Electric v. Joiner, supra,* an opinion which undercuts Crown's argument for an "enhanced" standard of appellate review as much as it does Crown's expressed preference for bright-line rules and elimination of judicial discretion:

> Thus, while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*, they leave in place the "gatekeeper" role of the trial judge in screening such evidence. **A court of appeals applying "abuse of discretion" review to such rulings may not categorically distinguish between**

> **rulings allowing expert testimony and rulings which disallow it.**
>
> * * *
>
> In applying an overly "stringent" review to that ruling, [the court of appeals] failed to give the trial court the deference that is the hallmark of abuse of discretion review.

522 U.S. at 142-43 (emphasis added).

The categorical rule Crown seeks would have far-reaching collateral ramifications. If due process mandates admissibility of any evidence tending to be exculpatory of a wrongful state of mind in a civil trial for a civil penalty, then surely it would have the same effect in a criminal trial for a criminal penalty. The categorical rule Crown seeks would have a radical effect on a trial court's control over the evidence, and the manner of presenting that evidence, in any case where a defendant's state of mind is at issue.

In this case, balancing under Rule 403 worked as it was supposed to work. The trial court did not foreclose Crown from introducing evidence of its state of mind; but it did require Crown to present this evidence in a form that prevented the jury from directly hearing hearsay opinion evidence that was subject to no scrutiny by the trial court or cross-examination by plaintiff. Crown could and did present evidence that its decision not to put doors on its forklifts was reasonable; it could and did present evidence that its design decisions had been affected by military specifications; it could and did present evidence that it had made this choice to avoid increased risks in tip-over and off-dock accidents; it could and did present evidence that ANSI had rejected a recommendation that

doors be required; Crown's own accident data was before the jury, and Crown was able to refer to it to support (if it could) the representations it had made regarding the increased risks caused by doors; Crown could and did discuss any testing, performed in part by consultants, in which it had been involved; Crown could and did present expert testimony in defense of its choices; and Crown could have designated these consultants as expert witnesses and called them at trial, but chose not to. The trial court's decision not to admit the details of the expert opinions in the consultant's reports was eminently reasonable, in light of the evidence Crown was permitted to present and the other evidentiary options it had. There was simply no abuse of discretion here, and Crown's call for a categorical rule which eliminates trial court discretion is inconsistent with this Court's precedents and should be rejected.

Finally, the evidence which Crown insists was so critical essentially side-stepped the evidence plaintiff offered in support of punitive damages. *See* the discussion which follows in the next section. Plaintiff did not contend that Crown failed to take steps to discover the defect in its product; plaintiff contended that Crown repeatedly lied about the availability of doors, about whether doors would be consistent with ANSI and OSHA standards, about whether operators had died because of doors, about whether doors would reduce foot crush injuries. The fact that Crown consulted experts who recommended against doors did nothing to counter the evidence that Crown lied.

Crown's uphill battle to prove any prejudice, even if the district court had erred, was simply too steep.[9]

In summary, a trial court's discretion under Rule 403 works, and it worked in this case. The exercise of that discretion in this case has received thorough appellate review. There is no need to re-examine or to change well-established precedent to accommodate one litigant's disgruntlement with an appropriate exercise of discretion. That is particularly so because the categorical rule which

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[9] The Court of Appeals commented on the lack of prejudice to Crown:

> Even if the district court erred in excluding the independent engineer reports, Crown has failed to prove that it suffered prejudice. The jury received a substantial mount of evidence regarding the background information recommending a door that Crown relied upon when designing the forklift including ANSI standards, OSHA Regulations and Commentary, as well as testimony by Crown's designer Dunlap that he had consulted experts, received reports from them, and relied on their advice. The jury also heard testimony that an ANSI committee twice rejected a recommendation that doors become a requirement on standup forklifts. Although the excluded reports would have provided more evidence of the content of the materials Dunlap considered, the excluded evidence does not add anything to the background presented to the jury. Moreover, it is clear that the jury believed that Dunlap distorted data and other evidence for the purpose of limiting Crown's liability, including investigating tip-over and off-the-dock accidents while ignoring accidents such as McEuin's, although the latter were far more numerous. Expert reports commissioned by Crown and recommending against doors weighed against the distorted data likely would have done little to dissuade the jury from this belief. Therefore, we cannot conclude that excluding the engineer reports "more probably than not" tainted the jury's verdict.

Petition at 14a.

that litigant requests (for the first time in this Court) would necessarily have serious implications in other cases.

IV. Crown was not entitled to judgment as a matter of law on punitive liability, and there is no constitutional dimension to this issue.

Crown repeatedly asserts that the sufficiency of evidence to submit the issue of punitive liability to the jury must be subjected to "exacting scrutiny" – presumably a more rigorous standard than the *de-novo* review to which rulings on motions for judgment as a matter of law are usually subjected, and which the Court of Appeals provided in this case. Petition at 15a. This Court has made clear that a reviewing court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reese v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). As stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Thus, even though a reviewing court "should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reese, supra*, 530 U.S. at 151. As this Court stated almost sixty years ago in *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944):

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Crown urges that an "exacting scrutiny" of the evidence in support of punitive liability is mandated by the 14th Amendment and this Court's precedents requiring a review of the *amount* of an award of punitive damages to ensure that it comports with due process. *See, e.g., State Farm Mut. Automobile Ins. Co. v. Campbell*, 438 U.S. ___, 123 S. Ct. 1513 (2003); *BMW v. Gore, supra*. On appeal, Crown did not contend that the amount of the jury's award was unconstitutionally excessive, nor did Crown invoke any "heightened" standard of review. Furthermore, even where the amount of an award is an issue, and constitutional concerns are clearly implicated, this Court has prescribed the same *de novo* appellate review as was applied by the Court of Appeals to the liability issue in this case. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001), noting that the Court had already rejected the plea for a "heightened scrutiny" even where the *amount* of an award is in controversy. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993).

In fact, Crown's real exception is not to the standard of review but to the refusal of the courts below to adopt its approach to the evidence – an approach which characterizes plaintiff's evidence as "speculative" or mere "unsupported arguments," and which thus insists that the evidence must be construed, and its credibility assessed, in its favor.[10] Crown has repeatedly invited the reviewing courts, at all levels, to re-weigh the evidence and become a 13th juror, and its selective approach to the evidence was noted by both courts below. The Court of Appeals observed, "Crown attempts on appeal to have us view the evidence selectively and in its favor." Petition at 17a. The district court made a similar observation, and provided a succinct summary of the inferences which a jury could reasonably have drawn from the evidence before it:

> After construing the evidence in the light most favorable to plaintiff, however, it cannot be said that only one reasonable conclusion, one which is contrary to the jury's, is permitted. The evidence presented at trial, if viewed most favorably for plaintiff, suggested the following: Crown's forklifts were unreasonably dangerous; the explanations proffered by Crown for failing to put doors on the forklifts were specious; Crown's collection of information was skewed and/or misleading; Crown committed misrepresentations; and Crown stood to possibly profit from disregarding important safety concerns involving the addition of forklift doors. This evidence, when accepted and

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[10] Crown even argues that "the jury should not have been permitted to consider" admitted testimony to which it assigned no error on appeal. Petition at 29.

> viewed from a perspective favoring plaintiff, was sufficient to support the jury's decision to award punitive damages. Defendants' contentions offer rational interpretations of other evidence, which suggest that it would have also been reasonable for the jury to deny an award of punitive damages to plaintiff. While this is true, the possibility of reasonable alternatives to a jury's verdict is insufficient to compel judgment as a matter of law.

Petition at 25a-26a.

This evidence, and more, is summarized above in plaintiff's statement of the case. The specter of inconsistent punitive damages awards, presented by Crown in its Petition at 21, is chimerical; it ignores the facts that Crown sold hundreds of forklifts with doors, as had other forklift manufacturers who routinely made them available, and that its own accident data proved that doors provided protection against injury.

The Court of Appeals applied the right standard and reached the right conclusion. Crown's search for a constitutional handle for its complaints should be rejected.

CONCLUSION

Crown's petition presents nothing for this Court's consideration, and it should be denied.

Respectfully submitted,

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No. 03-585

IN THE

Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

Petitioner,

v.

WILLIAM McEUIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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I. RESPONDENT HAS FAILED TO PRESENT ANY ARGUMENT OR AUTHORITY THAT DEFEATS CROWN'S PETITION AND HAS MISCHARACTERIZED OR MISCONSTRUED CROWN'S ARGUMENTS AND EVIDENCE.

Crown Equipment Corporation's ("Crown") briefs and arguments in the courts below raised whether the exclusion of relevant, non-cumulative state of mind evidence was proper under Rule 403 and whether the punitive damages award violates the Due Process Clause. (*See* Memorandum in Support of Post-Trial Motions at 2, 14-15, 22-24; Brief of Defendants-Appellants, at 25-26, 30-39; Reply Brief of Defendants-Appellants, at 1-13; Motion for Rehearing.) As respondent points out, Crown has clarified, reframed and refined some of its arguments in its Petition. But Crown has made the same claim raised below – that the trial court failed to perform the proper Rule 403 analysis of its state of mind evidence and that it was crucial, outcome-determinative evidence on the punitive damages issue. The court of appeals then failed to engage in the proper Rule 403 analysis and paid at most scant attention to the trial court's arbitrary ruling. As this case and the precedents cited by Crown in its Petition demonstrate, courts require guidance on the proper application of Rule 403 and the correct standard of review for punitive damages evidence, especially non-cumulative, exculpatory state of mind evidence. There is no doubt that Crown's Petition raises significant issues.

Respondent has inappropriately recast and misconstrued certain issues and arguments raised by Crown. Respondent asserts that Crown has waived its claim that the punitive damages award in this case violates the Due Process Clause because the court failed to properly analyze and admit Crown's relevant state of mind evidence. This Court's precedent, however, holds that an arbitrary punitive damages award violates the Due Process Clause. When punitive damages are at issue the improper exclusion of exculpatory state of mind evidence also violates the Due Process Clause. Respondent claims that Crown has

waived its argument that, pursuant to *Gore* and *Campbell*, the court of appeals should have applied exacting scrutiny to the punitive damages evidence in this case. There could not be a more blatant violation of due process than the wholly inadequate analysis of the punitive damages evidence and the exclusion of Crown's relevant state of mind evidence by both the trial court and the court of appeals. Moreover, in Section II of its Petition Crown directly raises the misuse of Rule 403 without directly implicating the Due Process Clause of the United States Constitution.

Respondent also argues that the district court permitted Crown to introduce sufficient evidence of its state of mind with respect to the design decision at issue. Nothing could be more contrary to the record. Crown will not reargue this point here, however, respondent's opposition mischaracterizes the exclusion of the evidence.[1]

As pointed out in Crown's Petition and the dissent in the Court of Appeals, the district court's injudicious decision left Crown with the equivalent of no probative evidence of its

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1. While, because of the page limitation and the rule against reargument, Crown cannot address each of the mischaracterizations of the record by respondent, it is inconceivable that he claims that, "the trial court did not foreclose Crown from introducing evidence of its state of mind . . ." (Resp.Brief, at 16).

As explained by Judge O'Scanlan in his dissent:

> While the district court allowed Crown's engineer testify that he relied upon the views of outside consultants, the impact of the reports was lost because the jury was not allowed to view them directly. The jury was not allowed to view them directly. The jury was unable to observe that the reports were comprehensive and obviously prepared by exports in the field. Nor was the jury able to view the substance of the reports, which directly supports Crown's contention that it, in good faith, believed the addition of a door would make its forklifts *more* dangerous.

(App. at 22a).

state of mind with respect to its design decision. (*See* App. at 19a-23a). Contrary to respondent's representations, mentioning in a generic manner that Crown consulted reports and specifications did not provide any probative evidence to the jury. Exclusion of Crown's evidence is *per se arbitrary*.

Respondent further claims that Crown argues for a mechanical application of Rule 403. But Crown has advocated a well reasoned, non-mechanical application of Rule 403 that includes consideration of the evidence in light of all the facts and circumstances and heightened scrutiny of punitive damages evidence. Crown's position is that the trial court misapplied Rule 403 and the court of appeals failed to correct this blatant error.

Respondent also attempts to equate the analysis of opinion evidence under Rule 702 and *Daubert* with a Rule 403 analysis of relevant evidence in a punitive damages case. The two raise important issues and involve the judicial gatekeeping function but otherwise are not at all analogous. Respondent's arguments fail to recognize and address Rule 403's status as an extraordinary remedy or the analyses outlined in the various precedents cited by Crown.

II. THIS COURT CAN AND SHOULD ADDRESS THE SIGNIFICANT AND RECURRING LEGAL AND CONSTITUTIONAL ISSUES REGARDING THE USE OF FEDERAL RULE OF EVIDENCE 403 TO EXCLUDE RELEVANT STATE OF MIND EVIDENCE IN A PUNITIVE DAMAGES CASE.

This Court has jurisdiction to consider Crown's argument regarding the proper application of Rule 403 to the relevant state of mind evidence offered by Crown. Crown's claim that the district court failed to properly analyze and admit this crucial evidence has been made in the trial court and the court of appeals, so there is no waiver nor surprise issue.

This Court has jurisdiction to consider issues that clarify, reframe or refine the claims raised below or were not raised

before the district court or court of appeals. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 (2001); *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245-46, n.2 (2000); *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980). The issues Crown raises are "squarely presented and [will be] fully briefed." *Carlson*, 446 U.S. at 17, n.2. The issues are also important and will recur in cases where punitive damages are at issue. *See Carlson*, 446 U.S. at 17, n.2. Furthermore, parties are not limited to the arguments made in the lower courts once the claims have been presented there. *Harris*, 530 U.S. at 246, n.2.

Here, the claim that the punitive damages award was arbitrary and Crown's evidence should not have been excluded has been presented in the lower courts. (*See* Memorandum in Support of Post-Trial Motions at 2, 14-15, 22-24; Brief of Defendants-Appellants, at 25-26, 30-39; Reply Brief of Defendants-Appellants, at 1-13; Motion for Rehearing.) Crown, in its post-trial motions, argued that the punitive damages award violates the standards this Court established in *BMW v. Gore*. (Memorandum in Support of Post-Trial Motions at 14-15). Crown's arguments in its Petition clarify, reframe, and refine these claims.

This Court may address Crown's claims. In *Martin*, for example, the issue was coverage under Title III of the Americans with Disabilities Act. *Martin*, 532 U.S. at 664-65. Petitioner, PGA Tour, Inc., (1) asserted in the district court that it is a private club exempt from Title III; (2) argued in both the district and appellate court that the competitors' area is not a "public accommodation"; and (3) contended in this Court that competing golfers are not members of the class Title III protects. *Martin*, 532 U.S. at 678. This Court found that, although the PGA Tour did not make the same argument in its Petition that it made in the lower courts, the "Title III coverage issue" was before the lower courts and the Court exercised its discretion to decide it. *Martin*, 532 U.S. at 678, n.27. Ultimately, this Court decided the general issue although it had been argued on various grounds. *See Martin*, 530 U.S. at 678, n.27. This Court further concluded

that "[g]iven the importance of the issue" it could "exercise . . . discretion to consider it." *Martin*, 530 U.S. at 678, n.27.

The overarching issue presented below and here is whether Rule 403 can be used to exclude relevant and non-cumulative state of mind evidence offered in a punitive damages case. (Memorandum in Support of Post-Trial Motions, at 23; Brief of Defendants-Appellants, at 25-26, 30-39; Reply Brief of Defendants-Appellants, at 1-13; Motion for Rehearing). The decision challenged is the misuse of Rule 403 to exclude military specifications and engineering study data offered to rebut respondent's punitive damages evidence and show the jury Crown's design decision-making process for the lift truck at issue. Crown, in its post-trial motions and in the Ninth Circuit Court of Appeals, challenged the district court's erroneous and injudicious decision-making process that resulted in the exclusion of Crown's relevant state of mind evidence and an arbitrary punitive damages award. (*Id.*; Tr. Trans., at p. 306, lns. 11-20). The Ninth Circuit also breezed through its analysis of Crown's evidence and deferred to the district court's erroneous decision to exclude it. (App., at pp. 8a-14a, 18a, 28a-29a). It then failed to recognize the arbitrariness of the punitive damages award based on the character of the evidence offered and unlawfully excluded.[2]

The facts and circumstances of this case squarely present for consideration by this Court each of the issues articulated as Crown's "Questions Presented for Review." There could not be a more blatant violation of due process than the treatment of Crown's relevant state of mind evidence in this case. This is not an unusual or particularly complex case. It is the kind of products liability action that is filed multiple times daily

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2. To support the arbitrary award Respondent argues that purported "lies" allegedly told to James Perry (all of which Crown denies) who was not in any way involved in the purchase of the lift truck at issue provides the foundation. As in *Campbell*, an award based on evidence with no nexus to the conduct at issue can not support a punitive damages award.

throughout the United States. Such cases often involve a claim for punitive damages based on the design decisions made. Thus, this is an excellent vehicle for this Court to clarify the correct use of Rule 403, further develop its punitive damages jurisprudence and protect due process rights by establishing appropriate evidentiary and appellate review standards. These are fundamental questions that only this Court can answer. Without this Court's guidance, under the Ninth Circuit's analysis, arbitrary punitive damages awards will continue to be upheld after exclusion of highly probative and exculpatory state of mind evidence.

III. THE RULE 403 ANALYSIS IS NOT THE SAME AS THE RULE 702 ANALYSIS AND THE STANDARD FOR PUNITIVE DAMAGES EVIDENCE SHOULD NOT BE THE SAME AS THAT FOR RULE 702 ADMISSIBILITY RULINGS. SUCH A STANDARD IN PUNITIVE DAMAGES CASES WOULD DIRECTLY CONFLICT WITH *GORE* AND *CAMPBELL*.

Respondent has failed to show that the District Court's analysis of the evidence Crown offered for the limited purpose of showing its state of mind was consistent with the purposes of Rule 403 and the Due Process Clause. It is telling that he failed to controvert or distinguish the precedents cited by Crown. Respondent's failure to squarely address Crown's legal arguments reveals the weakness of his position under the applicable law.

Crown does not advocate and has not requested this Court to embrace a "mechanical" application of Rule 403. As Rule 403 is an extraordinary remedy and there are procedural and constitutional limitations on punitive damages awards to prevent arbitrary punishments, Crown proposes an exacting review of the state of mind evidence offered in a punitive damages case. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513, 1519-20 (2003). This is consistent with the

exacting, *de novo* review of a trial court's decision on punitive damages. *Id.* at 1520-21.

Contrary to respondent's arguments, Crown's claim is that Rule 403 cannot be arbitrarily employed to exclude such evidence when it is relevant and non-cumulative. Thus, its proposed standards do not embrace a "mechanical solution" to the problem of prejudice addressed by Rule 403.

The notes to Rule 403 cited by respondent and by this Court in the *Old Chief* case support Crown's position here because these notes instruct courts to perform a thoughtful analysis that includes whether other proof is available. Here, the basis for Crown's appeal and petition to this Court is the District Court's mechanical and myopic consideration of Crown's relevant and highly probative state of mind evidence. Contrary to respondent's unsupportable claims, there was no other equally probative and similar proof available to Crown. It offered such critical evidence for the sole purpose of rebutting respondent's state of mind evidence. Such evidence was not in any way prejudicial and there was no equally probative evidence that would fairly so inform the jury for its punitive damages determination. The trial court should have admitted it and the court of appeals should have applied exacting scrutiny to the trial court's failure to do so. It did not.

Moreover, contrary to respondent's assertions, this case does not present a situation analogous to *Old Chief* or *Joiner*. In *Old Chief*, the Court reviewed the Rule 403 analysis in the context of cases involving proof of felon status. *Old Chief v. United States*, 519 U.S. 172, 183 (1997). While certain general principles in the opinion are helpful, the facts and circumstances are not analogous to those here, which focus on evidence offered to prove Crown's state of mind in a punitive damages case. The constitutional concerns addressed in *Gore* and *Campbell* which are inherent in the Rule 403 issue here, are not involved in the *Old Chief* analysis. In *Joiner,* the Court held that abuse of discretion rather than a heightened standard of review applied

to the exclusion of expert testimony under Rule 702 or *Daubert*. *General Electric Co. v. Joiner,* 522 U.S. 136, 143 (1997). Such a specious argument ignores this Court's teachings as to the heighten scrutiny required any time punitive damages are at issue. Review of a *Daubert* (Rule 702) analysis of whether scientific evidence is relevant and reliable is not at all the same as a Rule 403 ruling to exclude highly relevant state of mind evidence in a punitive damages case.

Contrary to respondent's suggestion, the *Joiner* case does not preclude a heightened standard of review for punitive damages evidence. It is true because it is not the same in fact or in kind as review of a *Daubert* ruling on expert testimony. Rule 702 is not an extraordinary remedy like Rule 403. *Joiner* did not involve state of mind evidence rebutting punitive damages. *Joiner* was a lung cancer case involving alleged PCB exposure that addressed exclusion of expert testimony based on irrelevant animal and epidemiological studies. *Joiner*, 522 U.S. at 143-44. The trial court excluded this evidence because the studies did not support the proffered testimony. *Joiner*, 522 U.S. at 143-44. It was not relevant. It cannot be argued that the excluded evidence in this case was irrelevant.

Thus, respondent makes an erroneous comparison between relevant state of mind evidence in a punitive damages case and the admission of an expert opinion under Federal Rule of Evidence 702. There is no comparison. The only similarity is the trial court's role as gatekeeper with respect to evidence. The analyses of and the standards to determine admissibility of the two types of evidence, however, should not and cannot be the same. Respondent's arguments are outside the realm of the issues presented to this Court by Crown. Respondent without any rationale erroneously asks this Court to apply the *Joiner* analysis here.

Crown does not seek a rule that categorically distinguishes between decisions allowing relevant state of mind evidence and decisions disallowing it. Rather, Crown urges a rule, which the Constitution and case law support, of absolute admissibility of

relevant, non-cumulative state of mind evidence on the issue of punitive damages. Crown does not seek to eliminate trial court discretion. Rather, it seeks a rule that prohibits trial courts from arbitrarily excluding relevant, non-cumulative punitive damages evidence. Just as an award of punitive damages merits greater scrutiny than an actual damages award, evidence bearing on punitive damages issues requires heightened scrutiny at all levels. *See Campbell*, 123 S. Ct. at 1520-21.

Consistent with this Court's rules, Crown will not repeat the arguments it made in its Petition. Crown, however, must respond to the mischaracterization of the evidence and dispute presented here. Contrary to respondent's representations, the trial court precluded Crown from showing the jury the critical information it relied on when making its design decision. Crown offered this evidence to educate the jury about its thought process in making its design decisions for punitive damages purposes only. This evidence was crucial to rebut respondent's arguments and speculative testimony about the addition of doors to lift trucks. Crown did not offer this evidence to show it took steps to discover some defect in its products as respondent contends. It offered this critical evidence to show it made a good-faith design decision to protect the safety of lift truck operators. If this evidence was not relevant and highly probative, then no exculpatory state of mind evidence could ever be.

This Court's precedents mandate exacting appellate review or *de novo* review of a trial court's application of the *Gore* guideposts to a jury's punitive damages award. *Campbell*, 123 S. Ct. at 1520-21. As indicated in Black's Law Dictionary, an appeal *de novo* or *de novo* review means, "the Appellate Court uses the trial court's records but reviews the evidence and law without deference to the trial court's rulings." The Ninth Circuit was required to apply this exacting scrutiny to the trial court's exclusion of Crown's highly probative punitive damages evidence. It completely failed to do so. Respondent's attempt to distinguish the analysis of the amount of a punitive damages award from the analysis of punitive damages evidence

is unsupported and unsupportable. *Campbell*, 123 S. Ct. at 1520-21. Such effort is unfounded and contradicts this Court's holdings in *Campbell*. Respondent's arguments that an abuse of discretion standard applies, despite the Courts' decisions in *Campbell* and *Gore* make Crown's case that its petition should be granted. Without the appropriate evidence and procedural safeguards, a punitive damages award constitutes an arbitrary punishment, which violates both the Due Process Clause and Fourteenth Amendment. *See Campbell*, 123 S. Ct. at 1519-20. Respondent cites language of the district court concluding that on the record the jury reasonably could have denied an award of punitive damages. This shows that the punitive damages award was not based on clear and convincing evidence, and is arbitrary, especially when considering the highly probative state of mind evidence improperly excluded. For these reasons, Crown continues to challenge, as it must, the Ninth Circuit's and trial court's decisions.

Respondent's opposition brief does not present any argument that defeats Crown's Petition. The arguments made and authorities cited do not establish that there is settled law on these issues or that the Court of Appeals and trial court properly evaluated the punitive damages evidence in this case. It was a violation of Rule 403 and due process to exclude Crown's highly probative, exculpatory state of mind of evidence. The Court of Appeals applied the wrong standard and reached the wrong conclusion. Crown has presented legal and constitutional issues of great importance to this Court and to the judicial process, all of which are consistent with and will provide critical clarification of this Court's recent punitive damages opinions. Crown's arguments are also consistent with the letter and purpose of Rule 403. Respondent has failed to reply directly to Crown's arguments or distinguish the precedent Crown relied on because he cannot.

CONCLUSION

Crown's Petition presents important issues for this Court's consideration, and it should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

CROWN EQUIPMENT CORPORATION,

Petitioner,

v.

WILLIAM McEUIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF AMERICAN INSURANCE ASSOCIATION, ASSOCIATIONS OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF CROWN EQUIPMENT CORPORATION'S PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Insurance Association ("AIA") is a national trade organization whose members comprise over 400 insurance companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA is a non-profit Delaware corporation headquartered in Washington, D.C. which maintains seven regional offices and retains legislative counsel in every state capital. AIA is not a publically held company and does not issue shares to the general public.

Amici curiae Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada ("Defense Counsel") are non-profit California corporations organized as voluntary professional associations with over 3,000 member-attorneys established to promote the administration of justice and to enhance the standards of civil defense and trial practice in the state and federal courts. Defense Counsel are not publically held companies and do not issue shares to the general public.

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INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

The American Insurance Association ("AIA") and the Associations of Southern California Defense Counsel and Defense Counsel of Northern California and Nevada (hereafter referred to as "Defense Counsel," and collectively with AIA, as "amici") submit this brief in support of the petition for writ of certiorari of Crown Equipment Corporation ("Crown").

AIA is a non-profit national trade organization whose insurance company members comprise over 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. These companies collectively represent more than one quarter of all property and casualty insurance underwritten annually in the United States. A substantial portion of AIA member companies' business is commercial liability insurance, the coverage which enables American businesses to provide the goods, services, jobs and investments vital to the country's economic health.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for any party has authored this brief in whole or in part and no person or entity, other than amici and their members, made a monetary contribution to the preparation or submission of this brief. Counsel who authored this brief are members of Defense Counsel, and one of Crown's insurers is a member company of AIA.

All parties have given consent under Supreme Court Rule 37.2 to the filing of this amici brief by stipulation filed concurrently with the Clerk of the Court.

Defense Counsel are non-profit professional associations of trial attorneys with over 3,000 members who practice before the state and federal courts in several of the western states within the Ninth Circuit. Defense Counsel are devoted to promoting the administration of justice and enhancing the standards of civil defense and trial practice through education, legislation and advocacy.

Amici and their members have a substantial interest in the issues presented. According to recent pronouncements by this Court, Due Process requires a substantially greater showing of unlawful conduct – the equivalent of criminal misbehavior, malice or intent to injure – before punitive damages may be imposed in the civil context. The evidence of defendant's "reprehensibility," both during and after the trial, must be closely scrutinized by the courts, with any doubts about the sufficiency of that evidence being resolved *against* the verdict in order to avoid the arbitrary imposition of punitive awards that offend Due Process standards.

The record in this case well illustrates that the lower courts are in conflict regarding proper application of these principles. William McEuin injured his foot in an accident while operating a standup forklift for his employer Price Costco ("Costco"). McEuin sued Crown, the manufacturer, for strict product liability under Oregon law maintaining that a forklift manufactured without "doors" was more dangerous than one manufactured with them. In addition to compensation for his injuries, McEuin claimed that punitive damages were warranted because Crown ignored applicable safety standards in the design of its lift equipment, and misrepresented those standards to purchasing

agents for his employer when the forklift was sold and delivered. App. 3a-4a.

Crown was denied Due Process protections when the trial court excluded evidence of a decades-long debate in the engineering community questioning the effectiveness of "doors" as a safety device on forklift equipment. Both the district court, and the court of appeals in its published decision, thereafter compounded the error by improperly reviewing the evidence "in the light most favorable" to the punitive damages verdict[2] – precisely the opposite of the "exacting scrutiny" standard which this Court has instructed must be applied to all aspects of a punitive damages award. Upholding a $1.25 million punitive judgment on appeal (over a vigorous dissenting opinion),[3] a majority of the Ninth Circuit panel held that the trial court did not "abuse its discretion" by excluding defense evidence supporting its no-door design, or alternatively, that preclusion of this evidence was "harmless error." App. 7a, 13a-14a. As *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. ___, 123 S.Ct. 1513, 155 L.Ed.2d 585 (April 7, 2003) was decided just a few weeks before the Ninth Circuit published its opinion in *McEuin*, AIA and other amici submitted briefs supporting Crown's petition for rehearing and suggestion for rehearing en banc

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[2] District court's post-trial mem., App. 25a-25b (emphasis added); maj. opn. on appeal, App. 5a and 16a.

[3] An identical compensatory damages verdict of $1.25 million was reduced by 50% because the jury found McEuin was equally at fault in causing his injuries. App. 6a; Crown Pet. at p. 2.

requesting clarification of these constitutional rules in light of *Campbell*.[4]

More recently, other divided panels of the Ninth Circuit have analyzed similar evidentiary issues, and applied differing standards of review, in response to constitutional challenges to punitive damages awards. Perhaps not surprisingly, these panels reached substantially different outcomes depending upon how those rules were applied. (See generally discussion in Argument, Sections II. and III. below.)

This Court should grant Crown's petition to clarify the rules governing the admissibility of exculpatory evidence bearing upon the state of mind of a defendant who is charged with punitive liability, and reaffirm that Due Process imposes heightened standards for judicial review of punitive damages claims at every stage of the proceedings. The development of clear guidelines in these areas of constitutional and procedural law is of significant importance to the business and legal community.

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[4] Amici's brief was accepted by the panel, and soon thereafter, Crown's petition for rehearing was denied with one minor modification. As modified, the opinion is published as *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028 (9th Cir. 2003).

ARGUMENT

I. Since Due Process Requires "Exacting Scrutiny" of the Evidence Supporting a Plaintiff's Punitive Damages Claim, That Same Heightened Standard Should Apply to Rulings that Exclude Exculpatory Evidence Refuting the "Reprehensibilty" of a Defendant's Conduct with any Doubts Resolved in Favor of Admissibility.

A. Exclusion of Relevant Exculpatory Evidence Deprived Crown of Important Constitutional Safeguards in its Defense of the Punitive Damages Claim.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or *arbitrary* punishments on a tortfeasor." *Campbell*, 155 L.Ed.2d at 600 (emphasis added). Earlier this year, *Campbell* amplified upon the policy reasons underlying the constitutional mandate on meaningful judicial scrutiny of punitive damages awards. "Compensatory damages are intended to redress a plaintiff's concrete loss while punitive damages are aimed at the different purposes of deterrence and retribution." *Id.* at 600-601.[5]

Because punitive damages serve the same general purpose as "criminal penalties" in a civil setting but

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[5] Citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 524 U.S. 424, 432 (2001) (*"Cooper"*); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (*"Gore"*); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (*"Haslip"*); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (*"Honda"*). AIA and other insurance industry associations also participated as amici in *Campbell*. *See* 2002 WL 1964631 (U.S.).

without equivalent constitutional safeguards that would be afforded a criminal defendant, Due Process prohibits arbitrary deprivation of the civil defendant's property where punitive damages are sought. This requires heightened judicial scrutiny to assure that the jury receives objective legal guidelines that give "appropriate weight to evidence that is *relevant* and evidence that is tangential or only inflammatory." *Id.* at 600-601 (emphasis added). Due Process thus serves as both a substantive and procedural safeguard against arbitrary awards of punitive damages. *Ibid.*

As in earlier cases, *Campbell* "instructed courts reviewing punitive damages [after trial or on appeal] to consider three guideposts (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell, supra*, 155 L.Ed.2d at 601. Due Process further requires that, after conclusion of the trial, an appellate court must independently evaluate the evidence by "conduct[ing] de novo review of a trial court's application of [each guidepost] to the jury's award." *Ibid.*

To determine the defendant's reprehensibility – the most important indicium of a punitive award's reasonableness – a reviewing court must consider whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others [and whether] the harm resulted from intentional malice, trickery, or deceit, or mere accident. . . . It should be presumed that a plaintiff has been made whole by compensatory damages,

so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence." *Campbell, supra*, 155 L.Ed.2d at 602. In conducting this independent analysis, the most important element for the reviewing court to consider is evidence of defendant's "reprehensibility," including its *state of mind* demonstrating the equivalent of criminal disregard for the safety and welfare of others. *Id.* at 601-602, 605-607.

The evidentiary rulings made by the trial court in this case well illustrate the need for this Court to settle lingering questions of constitutional law governing the admissibility of evidence regarding this "most important indicium" of the validity of a given punitive liability verdict. *Campbell, supra*, 155 L.Ed.2d at 602.

Crown was deprived of important constitutional protections against the arbitrary imposition of punitive damages when the courts below excluded consideration of military specifications and two independent engineering reports recommending against the installation of doors on Crown's forklift – strong and persuasive evidence refuting McEuin's claim that this defendant had "acted with wanton disregard for the health, safety, and welfare of others." App. 18a-19a (O'Scannlain, J., dissenting).

B. Evidence of Defendant's State-of-Mind Refuting Plaintiff's Claim of Malice is not "Hearsay."

The record in this case presents a clear example of the kind of capricious and one-sided presentation of evidence resulting in an arbitrary punitive damages award. The

engineering evidence Crown offered was not inadmissable hearsay, and should not have been so cavalierly rejected by the lower courts as more prejudicial than probative under Federal Evidence Rule 403. Crown Pet. 24-25; App.19a-21a (O'Scannlain, J., dissenting).

As the dissenting opinion of Judge O'Scannlain aptly points out, "[McEuin] built his case for punitives on evidence tending to show that defendant wilfully disregarded its own accident data, ignored applicable safety standards, and lied to purchasers of its equipment, all in support of an overall strategy to stave off product liability litigation . . ." App. p. 19a (O'Scannlain, J., dissenting). But the jury only heard half the story: The fact that both of the independent engineering consultants Crown retained, after making detailed analysis, recommended *against* the addition of doors is strong evidence that Crown did not design its products with reckless indifference. App. 21a (O'Scannlain, J., dissenting).

The same is true of longstanding military design specifications known to Crown's engineers restricting the use of doors on forklifts for these very safety reasons. While Crown's engineers were apparently permitted to testify that they were aware of military specifications, they were precluded from explaining why those specifications were significant in the design of *this* product – directly refuting McEuin's claim that Crown had "misrepresented" applicable engineering considerations and acted with conscious disregard of the safety of forklift operators.

Crown rightly contends that this case has far-reaching implications in a number of areas, beyond products liability litigation. This case affects virtually any other context where the defendant's alleged intentional misconduct or

conscious disregard for the safety of others gives rise to a punitive liability claim – including, for example, professional liability, civil rights, employment practices and other statutory actions. *Cf.* Crown Pet. 23. Contrary to the views expressed by the district court and the Court of Appeals majority opinion, in such cases (even where only compensatory damages are sought), defendants are freely allowed to offer some "business justification" or other evidence of the reasons for their actions in order to refute claims of intentional wrongdoing or malice. *See, e.g., City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1366 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-611 (1985); *see also* App. 21a & n. 2 (O'Scannlain, J., dissenting) (rule applied to products liability and other claims); Crown Pet. 16-17.

In many actions requiring a fact-specific inquiry of the defendant's state of mind, including punitive damages claims, "the devil is in the details" (*see, e.g., Wessmann v. Gittens*, 160 F.3d 790, 797-798 (1st Cir. 1998); *Comfort v. Lynn School Comm.*, 263 F.Supp.2d 209, 249 (D. Mass. 2003)), and the outcome of a given case may be significantly affected by the interplay between federal procedural rules and the varying standards for recovery of punitive damages under state-based laws. *See In re: Stucco Litigation*, 175 F.R.D. 210, 216 (E.D. N.C. 1997); and cases discussed in Section III., *infra*.

However, the fact-specific nature of the inquiry should not dissuade the lower courts from following the constitutional principles enunciated by this Court's precedents when evaluating the sufficiency of evidence that support – or in Crown's case refute – claims for punitive damages. *See Freund v. Nycomed Amersham*, 326 F.3d 1070, 1087-1088 (9th Cir. 2003), *opn. vacated and modified after rhg.*,

___ F.3d ___, 2003 WL 223189196 at pp. *11-*14 (9th Cir. Oct. 21, 2003) (Gould, J., dissenting) (internal citations omitted).[6]

The "gatekeeper" role of the trial and appellate courts in performing this constitutional function is, thus, vital to assuring the fairness demanded by the constitution, and as illustrated by the present conflict among the lower courts, it is necessary for this Court to exercise its inherent power to fashion procedural and evidentiary guidelines consistent with the "exacting scrutiny" standard mandated by Due Process. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); *see also White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002), *amended*, 335 F.3d 833 (9th Cir. 2003); Crown Pet. 7 and 23.

C. Rule 403 Considerations Were Insufficient to Justify Denial of Crown's Constitutional Right to Offer Relevant Exculpatory Evidence in a Punitive Damages Trial.

The trial court should not have excluded this highly probative evidence under the balancing test of Rule 403.

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[6] In his dissenting opinion in *Freund*, Judge Gould of the Ninth Circuit dissenting called to mind the observation of Lord Mansfield: "The law does not consist in particular cases, but in general principles, which run through the cases, and govern the decision of them." *Freund, supra*, 326 F.3d at 1087 & n. 7 (9th Cir. 2003), *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *14 & n. 8 (Gould, J., dissenting) (internal citation omitted); *see also Haslip,* 499 U.S. at 43 (O'Connor, J., dissenting) ("lack of clear guidance heightens the risk [of] arbitrariness, passion, or bias").

Where the defendant's state-of-mind is placed in issue – as in every punitive damages claim asserting malice or other "reprehensible" conduct worthy of financial censure – only rarely should a jury be precluded from hearing evidence offered by the defendant to explain its conduct. *See Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983); *United States v. Thevis,* 665 F.2d 616, 633 (5th Cir. 1982) (Rule 403 as applied in criminal or civil cases is an "extraordinary remedy to be used sparingly" to avoid "undue prejudice" to the accused-defendant by the exclusion of otherwise relevant evidence); *cf.* App. 19a and 22a-23a (O'Scannlain, J., dissenting) (prejudicial impact must "substantially outweigh" probative value).

This salutary limitation on Rule 403 applies with greater force for constitutional reasons whenever punitive damages are claimed because the defendant's alleged "reprehensibility" remains the "most important indicium" of the validity of any punitive damages verdict imposed, and evidence bearing on its state-of-mind is highly relevant to that inquiry. *Campbell, supra,* 155 L.Ed.2d at p. 602.

II. Before and After the Trial, the Lower Courts Failed to Apply the Constitutional Standard of Exacting Scrutiny When Evaluating the Alleged "Reprehensibility" of Crown's Conduct.

The Ninth Circuit majority overlooked another essential safeguard against arbitrary punitive awards: "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Campbell*, 155 L.Ed.2d at 601, citing *Cooper*, *supra*, at 436 (quoting *Gore*, *supra*, 517 U.S. at 587 (Breyer, J., concurring)).

McEuin's punitive damages claim under Oregon law required "clear and convincing evidence" of malice or conscious disregard for safety. App. 22a (O'Scannlain, J., dissenting).[7] In *Honda*, this Court "held unconstitutional an Oregon statute that prohibited courts from reviewing excessiveness of punitive damages awards unless there was *no evidence at all* to support the [punitive] verdict." *Freund v. Nycomed Amersham*, *supra*, 326 F.3d at 1079, n. 10, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p.*14, n. 10 (emphasis added), citing *Honda*, *supra*, 512 U.S. at 418, 426-427. Similarly, in *Haslip*, the Court made clear that Due Process is satisfied only where procedures are employed that provide "definite and meaningful constraint" on a jury's discretion to award punitive damages by allowing adequate and independent post-verdict review procedures. *Haslip*, *supra*, 499 U.S. at 20-24.

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[7] The Ninth Circuit en banc recently confirmed that, under this Court's constitutional doctrine, the legal determination of whether punitive damages have been proven by "clear and convincing evidence" is to be evaluated on appeal de novo – i.e., without substantial deference to the trial court's view of the evidence. *Planned Parenthood of Columbia/Williamette Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002) (en banc), *cert. denied*, *American Coalition of Life Activists v. Planned Parenthood of Columbia/Williamette Inc.*, ___ U.S. ___, 123 S.Ct. 2637, 156 L.Ed.2d 655 (2003). State laws requiring "clear and convincing" proof of malice may serve as "an important check against unwarranted imposition of punitive damages." *Honda*, *supra*, 512 U.S. at 433. This higher standard has been described as requiring evidence " 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " *Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc.*, 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364, 394 (2000) (California law requiring "clear and convincing" evidence of malice).

> Read together *Haslip* and *Honda* teach that . . . it is the availability of post-verdict review that provides the most meaningful check on punitive damages. *White v. Ford Motor Co., supra,* 312 F.3d at 1025 (Graber, J., dissenting).

Campbell and *Gore* were likewise concerned with post-verdict review that assured some meaningful judicial evaluation of the evidence of malice, and avoiding "excessive" awards of punitive damages even after the defendant's malice had been demonstrated by the sufficient quantum of proof.

> [N]othing could be more "arbitrary" than to permit punitive damages in any amount to stand absent evidence of malice that is required by state law for imposition of punitive damages. A defendant such as [Crown], who acted without malice and who should not receive a punitive fine, must not be treated worse than a defendant who acted with malice and who deserves some punitive fine but in a lesser amount.

Freund v. Nycomed Amersham, supra, 326 F.3d at 1086 & n. 6, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at pp. *13-*14 & n. 7 (Gould, J., dissenting).

Such independent analysis of the evidence was markedly absent here. Throughout all phases of the proceedings, the lower courts turned the constitutional requirement of "exacting scrutiny" on its head. Disregarding Due Process considerations, the district court improperly required the *defendant* (Crown) to demonstrate under Rule 403 that the probative value of the evidence it offered

"outweighed" the potential prejudicial impact.[8] Then after the punitive verdict was rendered, both lower courts continued to view the evidence "in the light most favorable" to *imposing* punitive damages.[9] Such rulings and procedures are disturbingly reminiscent of Oregon's statutory scheme which lacked meaningful post-verdict review – contrary to Due Process standards consistently articulated by this Court since *Honda*.

Amici submit that, under the de novo standard of "exacting scrutiny" plainly enunciated in *Campbell*, *Honda* and other recent decisions of this Court, Crown should not have been precluded from offering evidence which, if duly considered by the jury (or the trial court for that matter), likely would have altered the outcome of at least the punitive damages verdict. App. 22a (O'Scannlain, J., dissenting).[10]

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[8] Even when Crown obtained the affidavit from one of Costco's purchasing agents after trial which directly contradicted plaintiff's claim that "[representatives of his employer] Jim Perry and Derek Tatum wanted doors" installed on Crown forklifts, the district court concluded that this exculpatory evidence was not "clear and convincing" proof warranting a new trial. App. 32a-36a (discussing Tatum's affidavit denying the statements attributed during closing argument).

[9] Remarkably, the majority opinion in this case concluded this amounted to "harmless error" under the circumstances. App. 13a-14a; *cf.* App. 22a (O'Scannlain, J., dissenting) citing *Freeman v. Allstate Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (prejudicial evidentiary error requiring reversal).

[10] There is ample authority for the proposition that where the defendant presents evidence that there was at least some objectively plausible reason for its conduct – here, manufacturing a forklift without doors – the reprehensibility prong cannot be established as a matter of law and the claim for punitive damages should not be submitted to the jury. *See, e.g.*, *Campbell*, *supra*, 155 L.Ed.2d at 604-607.

Just as all aspects of the plaintiff's evidence are subjected to heightened scrutiny in order to avoid arbitrary and capricious punitive awards in the civil setting, the same "exacting scrutiny" should apply to judicial rulings that deprive the defense of the legitimate opportunity to refute a claim of "reprehensible" conduct at every phase of the punitive liability case – before, during and after trial. *Campbell, supra*, 155 L.Ed.2d at 600-602, 604-607.

III. As Illustrated by the Majority Opinion in This Case, Decisions Within the Ninth Circuit Are Applying Due Process Principles in Punitive Damages Cases in an Arbitrary and Inconsistent Manner That Conflicts With This Court's Constitutional Jurisprudence.

Crown predicts that the views expressed by the majority opinion in this case are destined to give rise to inter-circuit conflict in the evaluation of punitive awards. Crown Pet. 17-18. Within the Ninth Circuit, that conflict is already evident.

One need only compare another recent products liability decision (involving the death of a child in a "rollaway" accident) that resulted in the reversal of a punitive damages award. In *White v. Ford Motor Co.*, *supra*, 312 F.3d 998 (9th Cir. 2002), *amended*, 335 F.3d 833 (9th Cir. 2003), another divided panel of the Ninth Circuit held that a $70 million punitive damages award was improper because erroneous jury instructions regarding extraterritorial conduct (compounded by improper closing argument) violated Due Process.

Although the *White* opinion addresses the unconstitutionality of imposing "extraterritorial" punitive damages liability on a defendant, it is premised on a Due Process analysis utterly lacking in the majority's opinion here.

According to *White*, the mere possibility that the jury's award encompassed a defendant's extraterritorial conduct rendered the award unconstitutional, "even if the size of the award itself . . . is not outside the bounds of due process." *White, supra*, 312 F.3d at 1016. In other words, if the evidence presented to the jury does not comport with Due Process, the award must be set aside regardless of its size.[11]

White stands in stark contrast to the majority opinion in this case. *White* implemented Due Process guidelines (without the benefit of this Court's recent discussion of similar issues in *Campbell*),[12] subjecting the punitive damages award to a searching inquiry and reversing where the award is based on improper jury considerations that should have been excluded (or admitted for only a

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[11] The dissenting opinion in *White* asserted that there are no clear guidelines for trial and appellate judges to follow in giving jury instructions or receiving evidence bearing on the "reprehensibility" prong of a punitive damages claim. According to the dissent, the *White* majority should have applied an "abuse of discretion" test – instead of de novo review – the same erroneous standard employed by the majority in *McEuin* (although *White* does not mention the present case by name). *White, supra*, 312 F.3d at 1025, 1028-1029 (Graber, J., dissenting).

[12] *Campbell* and *White* express concern over the imposition of punitive liability for extraterritorial conduct on the part of the defendant which may result in the assessment of a fine or sanction for conduct that is lawful outside the jurisdiction where the trial took place. *See Campbell, supra*, 155 L.Ed.2d at 604-607. Similar evidentiary issues are presented here given McEuin's theory that punitive damages were warranted because Crown disregarded worker safety in violation of Oregon law owing to some perceived "strategy to stave off product liability litigation" by preventing other potential plaintiffs from inferring that the absence of a door was a design defect. App. 19a (O'Scannlain, J., dissenting); App. 4a-5a.

limited purpose). In *McEuin*, the majority applied a far more deferential standard of review and held that the exclusion of exculpatory evidence relating to reprehensibility was "harmless error."

More recently, *Freund v. Nycomed Amersham,* 326 F.3d 1070 (9th Cir. 2003), *opn. vacated and modified after rhg.*, ___ F.3d ___, 2003 WL 223189196 (9th Cir. Oct. 21, 2003) reinstated a $1 million-plus punitive damages verdict in a California employment discrimination case. The district court had concluded after post-verdict motions that the evidence of defendant's malice was constitutionally deficient, and, accordingly, entered judgment as a matter of law in favor of the employer on the punitive claim. *Freund*, *supra*, 326 F.3d at 1074, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *2. After rehearing, yet another 2-to-1 majority panel of the Ninth Circuit reversed the district court's order – this time concluding that the defendant had "waived" the right to post-trial constitutional review of evidence supporting the punitive damages verdict. *Id.*, 326 F.3d at 1079, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *6.

The dissent disagreed. Under California law and applicable Due Process precedent, the defendant-employer's constitutional right to challenge the punitive award for lack of malice could not be "lost" by a mere technical failure to follow the requisite procedure.[13]

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[13] *Freund*, *supra*, 326 F.3d at 1082, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at pp. *9-*11 (Gould, J., dissenting) citing *Adams v. Murakami*, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348, 1354, n. 5 (1991); *Honda*, *supra*, 512 U.S. at 434-435. *See also*

(Continued on following page)

Moreover, the dissent reasoned that "the [Supreme] Court made clear that post-verdict review of punitive damages is the most important procedural safeguard on punitive damage awards and [has] held that lack of meaningful review of jury verdicts violates the Due Process Clause[.]" *Freund*, *supra*, 326 F.3d at 1087-1088, *opn. vacated and modified after rhg.*, 2003 WL 223189196 at p. *13 (Gould, J., dissenting).

McEuin, *White* and *Freund* are examples of the differing approaches courts within this circuit have taken when applying Due Process guidelines to punitive damages awards in just the past few months. But they also represent an intolerable degree of variance in constitutional jurisprudence.

CONCLUSION

Crown's petition raises important questions concerning the interplay between the rules of evidence and Due Process protections against improper awards of punitive damages. The constitutional safeguards established by this Court against arbitrary awards, on the one hand, should not be taken away by the lower courts, on the other hand, by impermissibly limiting the defendant's right to offer relevant evidence refuting the punitive claim.

Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc., *supra*, 78 Cal.App.4th at 891, 93 Cal.Rptr.2d at 394 (punitive damages reversed on appeal as a matter of law) and cases digested in Argument, Section II, n. 7 above.

Amici urge this Court to grant certiorari to address how Due Process concerns affect the proper evaluation of evidence in a punitive damages case, and the necessity of judicial review of that evidence with exacting scrutiny to avoid similarly capricious outcomes.

Respectfully submitted,

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